Collective Bargaining in the Public Service

The Federal Experience in Canada

Jacob Finkelman
and Shirley B. Goldenberg

Volume I

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JACOB FINKELMAN

SHIRLEY B. GOLDENBERG

VOLUME ONE

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To
Dora Finkelman
and
Carl Goldenberg
with gratitude and affection

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Foreword

Few problems have given rise to as much discussion in recent years at all levels of government in Canada as the handling of relations with those governments' own employees. Where twenty years ago collective bargaining was unknown in our public services, except in Saskatchewan, government employees are all now organized in unions with rights to bargain collectively and, in most cases, with the right to strike if a bargain cannot be agreed upon. In Ottawa, the Public Service Staff Relations Act of 1967 replaced the unilateral system of government determination of wages and of other conditions of employment for federal public servants by a bilateral system based on bargaining units throughout the service. The change was dramatic. As with any reform that is so revolutionary, the years of experience with the new system have raised a variety of questions and difficulties.

For the public, the most apparent problem arises when a strike occurs and a service is denied. There have been strikes at all levels of government, including areas as vital to the public as hospitals and schools, police and fire protection, air-traffic control and the postal service. It is not surprising that the public has, at times, questioned whether collective bargaining, and especially the right to strike, are appropriate for the employees of governments or of public institutions. It has been argued that the very concept underlying collective bargaining is inapplicable to a situation where the employer does not have to face bankruptcy or other market disciplines for incautious or overly expensive awards. On the other hand, public employees understandably believe that a system is biased against them when the employer can resort to Parliament or to a legislature to impose a settlement and can call on the courts to give sanction to the law that is passed. And yet, whatever the problems of principle or of practice, no one has suggested a better solution than collective bargaining. It is doubtful if many who have examined the issues think that it would be desirable to return to unilateral decision making by governments as employers — and even fewer think that such a move would be possible if it were desirable.

The federal government's implementation of the "6 and 5" policy by means of the Public Sector Compensation Restraint Act has put collective bargaining in the federal service 'on hold'. While the measure is obnoxious to the unions, the period of suspension of the bargaining process may have an unintended value. It may provide a much needed opportunity to look at all that has happened, to identify the serious problems, and to devise changes to the system for the years ahead.

With problems that are at the same time as difficult and as fundamental as these, it is important to have a knowledgeable and dispassionate analysis of the way the collective bargaining process works in our public sectors and is working in Canada. Jacob Finkelman and Shirley Goldenberg bring comprehensive knowledge, long experience and sound judgment to these volumes on collective bargaining in the federal public service. In a second work they will provide a comparable analysis of the situation in the provinces. Their conclusions and recommendations will deserve the thoughtful attention and careful consideration of all who are concerned about this most important area of policy for all levels of government in Canada.

Gordon Robertson
President
The Institute for Research on Public Policy
October 1983.

Avant-propos

Depuis ces dernières années peu de problèmes ont été autant débattus à tous les paliers gouvernementaux au Canada que celui de leurs relations avec leurs propres employés. Il y a vingt ans la négociation collective était inconnue parmi nos fonctions publiques, à l'exception de la Saskatchewan, mais aujourd'hui les fonctionnaires sont tous syndiqués et détiennent le droit de négocier en tant que collectivité. Aussi, dans la plupart des cas, ont-ils le droit de déclencher une grève si une entente leur semble irréalisable. À Ottawa, la Loi sur les relations de travail dans la Fonction publique de 1967 remplace le système unilatéral de fixation des salaires et d'autres conditions d'emploi des fonctionnaires fédéraux par un système bi-latéral fondé sur le principe d'unités de négociations à travers toute la Fonction publique. Le changement fut radical. Tel qu'anticipé pour toute réforme aussi révolutionnaire, plusieurs questions et problèmes sont apparus au cours des années d'implantation du nouveau système.

Selon la perspective du public, le problème le plus évident est celui d'une grève et de l'absence d'un service qu'elle enchaîne. Des grèves se sont déclenchées à tous les paliers du gouvernement et ont touché des services publics essentiels tels les hôpitaux et les écoles, les policiers et les pompiers, le contrôle du trafic aérien et le service postal. Il n'est pas étonnant que le public ait parfois mis en question le bien-fondé de la négociation collective et surtout du droit de grève dont jouissent les employés de l'État ou des services publics. Certaines personnes présentent l'argument que le concept sous-jacent à la négociation collective ne peut prévaloir dans un cas où l'employeur est à l'abri de la faillite ou de tout autre mécanisme disciplinaire du marché suite à des décisions imprudentes ou démesurément onéreuses. D'autre part, les fonctionnaires croient, avec raison, qu'un système est biaisé à leur désavantage lorsque l'employeur peut avoir recours au Parlement ou à une législature dans l'intention d'imposer une entente et peut faire appel à la cour afin de sanctionner une loi qui est adoptée. Mais malgré tout, quelles que soient les questions de principe ou de coutume, la négociation collective demeure la meilleure solution. Il est fort douteux que ceux qui ont approfondi la question considèrent qu'il est souhaitable que les gouvernements en tant qu'employeurs reprennent le droit de prise de décision unilatérale — même si cette alternative était désirable, il est difficile de croire qu'elle soit réalisable.

La négociation collective au sein de la Fonction publique fédérale a été placée en attente depuis la mise en œuvre de la politique « 6 et 5 » du gouvernement fédéral par le truchement de la Loi sur les restrictions salariales du secteur public. Bien que cette mesure soit odieuse aux yeux des syndicalistes, cette période d'interruption du processus de négociation peut avoir un effet bénéfique inattendu. C'est une occasion propice qui permet d'examiner toutes les étapes qui se sont déroulées, de cerner les problèmes majeurs et de proposer des changements systémiques pour les prochaines années.

Face à des problèmes aussi complexes et aussi fondamentaux, il est important de saisir d'une manière renseignée et objective comment le processus de la négociation collective se déroule dans nos fonctions publiques et partout à travers le Canada. Jacob Finkelman et Shirley Goldenberg apportent à ces volumes sur la négociation collective dans la Fonction publique fédérale une connaissance approfondie de la question, une longue expérience et un jugement précis. Dans le cadre d'une seconde œuvre, ils présenteront une analyse comparée de la situation dans les provinces. Leurs conclusions et leurs recommandations méritent une attention particulière et un examen minutieux de la part de tous ceux et celles qui s'intéressent à cette question de politique très importante pour tous les paliers gouvernementaux au Canada.

Gordon Robertson
Président
L'Institut de recherches politiques
Octobre 1983

Preface

Our purpose in this study has been to examine a unique statute, a "bold experiment", as it has been aptly described. This statute is unique in the sense that no similar *broad-scale* experiment had been attempted in any jurisdiction as large as that to which the Public Service Staff Relations Act applied. Any piece of social legislation is bound to bring in its train a whole list of adjustments, particularly where the statute sets up a framework for a new relationship between two institutional parties, each of which has its own goals to pursue and purposes to achieve. We have sought to ascertain how the parties have accommodated themselves to the legislation and to examine the problems they have encountered in adapting their operations to its provisions. We have also examined the way in which the authorities charged with responsibility for administering the law have gone about breathing life into it. Mechanical construction and application of the provisions of the Public Service Staff Relations Act would have done little to advance the objectives of the authors of the legislation. The attainment of these objectives has been made all the more difficult by the fact that although many problems have become apparent that call for amendment of the legislation, a decade and a half has passed without any change in the statutory rules by which the parties must conduct their affairs.

Throughout this study there are numerous references to proceedings involving employees in the Post Office. The bargaining agents representing these employees raised many important issues on which the Public Service Staff Relations

Board, the Chairman of the Board, and the adjudicators were called upon to make decisions relating to the meaning and application of the legislation. Although the Post Office is no longer governed by the Public Service Staff Relations Act (except for a transitional period for some areas of jurisdiction), the principles established in these cases retain their validity for matters that fall under that Act for the public service.

In a dynamic situation such as one finds in the administration of collective bargaining legislation, new problems come to light and have to be dealt with day by day. It is impossible in a study of the sort we have undertaken to cover events right up to the time of publication. We came to the conclusion that a 'cut-off' point of September 1981 would be appropriate for most purposes. However, where there have been later developments that were particularly significant, we have attempted to include reference to them at appropriate places. In a few cases this required revisions to the manuscript after it had been submitted to the publisher. We revised the manuscript to take account of the Supreme Court decision concerning the air traffic controllers and an interesting adjudication award in a controversial conflict-of-interest case. Our last revisions were made on account of the Public Sector Compensation Restraint Act enacted 4 August 1982. Ironically, this last development has placed 'on hold' for at least two years most aspects of the collective bargaining regime with which this study has been concerned.

This study was not designed as a text for lawyers and advocates, but inevitably, since we were dealing with a rather complex and comprehensive piece of legislation, we have had to devote a great deal of attention to the legal aspect. Our presentation takes into account the fact that many of the sources to which reference is made are not readily available to many readers. There is no published up-to-date series of reports on the Public Service Staff Relations Board's decisions or adjudication decisions, and there is no published series of reports on terms of reference to conciliation boards or of arbitral awards in interest disputes.

The Authors

Jacob Finkelman took undergraduate and graduate degrees in Arts and Law at the University of Toronto and Osgoode Hall Law School. He was called to the Bar of the Province of Ontario in 1930 and in the same year joined the Faculty of the University of Toronto. There he taught in Arts and Law until 1954, achieving the rank of full Professor. In 1932 he inaugurated the first course in Labour Law taught in Canada. In 1943 he became Legal Advisor to the Select Committee on Collective Bargaining of the Ontario Legislative Assembly and in the same year assisted in drafting the Ontario Collective Bargaining Act, 1943. In that year, too, he was appointed Registrar of the Labour Court, newly established as a branch of the Supreme Court of Ontario.

The following year Professor Finkelman was appointed Chairman of the newly created Ontario Labour Relations Board, where he served until returning to full-time teaching at the University of Toronto in 1947. In 1953 he was reappointed Chairman of that Board on a full-time basis. From 1954 to 1967 he was Special Lecturer at the Graduate School of Business Administration at the University of Toronto, lecturing on Labour Law. In 1964–65 he served as a consultant to the Preparatory Committee on Collective Bargaining in the Public Service (the Heeney Committee). In 1967 he was appointed Chairman of the Public Service Staff Relations Board of Canada to administer the Public Service Staff Relations Act. He held this position until his retirement in 1976. From 1972 to 1976 he held the post of Chairman of the Yukon Public Service Staff Relations Board, and from 1974 to 1976 he served, as well, as Chairman of the Yukon Teachers Staff Relations Board.

At the request of the President of the Privy Council, Professor Finkelman undertook an examination of the Public Service Staff Relations Act and its administration, and produced a three-part report entitled *Employer-Employee Relations in the Public Service of Canada: Proposals for Legislative Change*.

Professor Finkelman is a member of the National Academy of Arbitrators. He served as Vice-President of the Association of Labor Mediation Agencies in 1973-74 and as President of the Society of Professionals in Dispute Resolution in 1976. He was named a Q.C. in 1946 and became an Officer of the Order of Canada in 1976; he received an LL.D. (*honoris causa*) from York University in 1977.

Shirley Goldenberg is Professor of Industrial Relations and Co-ordinator of the Industrial Relations Area in the Faculty of Management of McGill University. Born in Montreal, she was educated at McGill and pursued post-graduate work at the University of Chicago. She has been a member of the McGill teaching staff since 1967.

Professor Goldenberg is a Past President of the Canadian Industrial Relations Institute and has served on the Executive Board of the Industrial Relations Research Association (U.S.A.) She is a member of the Economic Council of Canada and has acted as an adviser to government on labour relations and as arbitrator in industrial disputes.

In addition to following her teaching career, Professor Goldenberg has lectured and written extensively on various aspects of industrial relations and is recognized as an authority on collective bargaining and dispute resolution in the Canadian public sector. Her articles and papers have been published in leading journals in Canada, the United States and Europe.

Professor Goldenberg is the author of *Professional Workers and Collective Bargaining*, a study for the Prime Minister's Task Force on Labour Relations and the first publication on the subject of professional bargaining in Canada. She is also the author of chapters dealing with the Canadian industrial relations scene in a number of books edited by eminent authorities and co-author of the chapter on Canada in *Industrial Relations in International Perspective*, sponsored by Harvard University.

Summary

Bargaining Rights for Government Employees: A Relatively Recent Phenomenon

Employees of senior levels of government in Canada represent the most highly organized sector of the economy. Close to 100 per cent of federal and provincial government employees eligible to bargain collectively are members of employee organizations and are covered by collective agreements. Yet these are the newest actors on the collective bargaining scene.

Collective bargaining rights on the private sector model have long been taken for granted in Canada for employees of municipal governments and for workers in a wide range of other public services, including many federal and provincial government agencies and boards. Nevertheless, the federal government and all but one of the provinces were still resisting the extension of similar rights to their own employees less than two decades ago. The exception was the Province of Saskatchewan, where, as early as 1944, a socialist government had included its own employees, without qualification, in the coverage of its original labour legislation, the Trade Union Act.

The practice of unilateral decision making by governments as employers, apart from the Government of Saskatchewan, was justified primarily on the principle of the sovereignty of the state. This principle was not seriously challenged before the early 1960s. However, events moved rapidly thereafter. The changing attitude towards collective bargaining by government employees has, in fact, been one of the most significant developments in industrial relations in recent years. In 1965, more than twenty years after the Saskatchewan initiative, but barely one year after Quebec's own premier, Jean Lesage, had made the categoric statement that "the Queen does not negotiate with her subjects," the Government of Quebec took a lead over the other provinces and the federal government by granting to employees in the civil service broad collective bargaining rights, including the right to strike. The federal government followed suit in 1967, New Brunswick in 1968, British Columbia in 1973. Newfoundland ostensibly included the right to strike in public service labour legislation first enacted in 1970, but until it was amended in 1973, its legislation imposed far greater restrictions on the exercise of this right than existed in the other jurisdictions. The remaining provinces have all extended bargaining rights to their own employees, but with third-party arbitration of unresolved disputes as a substitute for the right to strike.

Peculiarities of the Public Sector: A Public Policy Problem

It seems to have been widely accepted that certain fundamental differences between the private and public employer, in particular the public employer's overriding responsibility for the public interest, would have to be taken into account when granting bargaining rights to government employees. Accordingly the federal government and all the provinces, apart from Saskatchewan, have made some particular provisions with respect to their own employees, most often in separate statutes granting them bargaining rights. An examination of the legislation shows, however, that wide policy differences still exist among jurisdictions concerning the most appropriate mechanism, at each stage of the process, by which to accommodate, to the particular characteristics and responsibilities of employment at a senior level of government, the rights that are available to workers in the private sector and in other areas of the public employment.

Purpose and Scope of the Study

As there is now a considerable body of experience under a wide range of policy options in Canada, the time seemed ripe to examine these options in detail to see how they have been working in practice. We have devoted these two volumes to the federal experience for a number of reasons: the innovative provisions of the Public Service Staff Relations Act (PSSRA); the large number of employees the Act covers in all areas of the country and even beyond, in the foreign service; the extent and variety of experience in several rounds of bargaining since this statute was enacted; and the considerable influence the Act has had on other legislation that followed. A second work, for which research is already under way, will contain a detailed examination and comprehensive analysis of public sector labour relations in the provinces.

It is ironic that most aspects of the collective bargaining regime with which this study is concerned were suspended by the Public Sector Compensation Restraint Act (PSCRA), shortly after our manuscript was submitted to the publisher. The PSCRA has, in effect, placed wage negotiations 'on hold' in the federal public service, as well as in other areas to which it applies, for approximately two years following the end of June 1982. This development necessitated a few revisions to the manuscript, but has not affected our general conclusions and recommendations, which are based on the assumption that the PSCRA will lapse, and that collective bargaining will be permitted to resume as before, following the period mentioned in the Act.

The Public Service Staff Relations Act

The enactment of the PSSRA in 1967 has been characterized as a "bold experiment". It replaced a unilateral system for the determination of most terms and conditions of employment for federal public servants with a bilateral system whereby employees were assured a large measure of participation in the determination of those terms and conditions.

Coverage

The PSSRA governs labour relations in departments of the federal government, otherwise known as the 'central administration', as well as in a number of agencies, offices and boards such as the National Research Council, Social Sciences and Humanities Research Council, National Film Board, Northern Canada Power Commission, and a few others. These are designated as 'separate employers'. Employees of certain employers are excluded from bargaining collectively under the Act. This exclusion applies, for example, to employees of the Public Service Staff Relations Board (PSSRB), the independent tribunal that is responsible for administering the Act, to employees of the Senate, House of Commons and Library of Parliament, and to members of the Armed Forces and the Royal Canadian Mounted Police. Persons locally engaged outside Canada, persons paid fees of office, part-time employees ordinarily required to work less than one third of the normal period, and casual employees with less than six months' service are also specifically excluded from the definition of 'employee' under the Act and consequently from bargaining rights.

As in most of the private sector legislation, persons employed in a managerial or confidential capacity are ineligible for collective bargaining. The definition of managerial and confidential employees falls into two parts under the PSSRA: first, persons confidential to specified senior officials of government or to the federal courts and persons employed as legal officers in the Department of Justice; secondly persons having executive duties or responsibilities in relation to the development and administration of government programs, persons whose duties include those of a personnel administrator, and persons involved in collective bargaining on behalf of the employer, or who are required to deal with grievances on behalf of the employer, as well as persons employed in a confidential position to the foregoing. Where disagreement arises over managerial and confidential exclusions, the PSSRA, like the private sector labour legislation, provides for the matter to be decided by an independent tribunal, in this case the PSSRB.

Establishing the Bilateral Relationship

The determination of an appropriate bargaining unit and the certification of a representative bargaining agent are necessary preliminaries to collective bargaining in the public and private sectors alike. In the public sector it is also essential to be clear on who will represent the government employer for purposes of collective bargaining. This point is determined by statute in the federal public service, while the certification of bargaining agents representing employees is handled by the PSSRB.

The PSSRB must assure itself that the organization applying for certification is an employee organization within the meaning of the PSSRA and that it represents the will of a majority of employees in an appropriate bargaining unit. However, while the Board is responsible for determining the appropriateness of a bargaining unit, it must do so within guide-lines set out in the Act. The guide-lines, based on occupational categories and groups, represent one of the more innovative features of the Act. They were designed, in part, to ensure some coincidence between the group of employees to which a particular pay scale or set of working conditions applied and the group of employees for which a particular bargaining agent would be certified to speak. They were also designed to pave the way for the orderly introduction of a collective bargaining regime by avoiding the inevitable arguments that would ensue if conflicting organizations were free to urge on the Board a variety of principles that would determine how bargaining units were to be constructed. Five occupational categories were specifically identified in the Act: scientific and professional, technical, administrative and foreign service, administrative support, and operational. For the central administration a number of occupational groups were specified within each occupational category, to a total of seventy-two. During the initial certification period, from 13 March 1967 to 30 September 1969, the Board was required to determine bargaining units in such a way that they would be composed of all the employees in an occupational group or of employees other than supervisory employees in an occupational group or of supervisory employees in an occupational group. Of the few supervisory units that have been certified, all but one were in the operational category; the one exception has since been merged with a non-supervisory unit. The practice in the other categories has been to include supervisory and non-supervisory employees in the same bargaining unit.

The fact that within two years of the coming into force of the PSSRA, 95 per cent of the employees were in bargaining units for which a bargaining agent had been certified indicates that the certification procedure was expeditious. The expeditious certification of bargaining units may also be explained, to a large extent, by the extent of organization that existed when the Act came into effect. Most of the bargaining agents had existed, in one form or another, long before the bargaining legislation was enacted. They had, in fact, enjoyed a sort of implicit recognition by virtue of their membership in the National Joint Council (NJC), through which they had engaged, since 1944, in informal consultation with the employer.

By September 1981, 19 employee organizations had been certified as bargaining agents in the federal public service. Together they represented 122 bargaining units, 81 of which were comprised of employees of the 'central administration'; the rest were distributed among the 'separate employers'. (See Table 8.) These bargaining units cover a broad spectrum of occupations, from relatively unskilled manual workers at the bottom of the occupational hierarchy to highly trained technical and professional personnel and foreign service officers at the top. By virtue of their occupational structure, the vast majority of bargaining units in the 'central administration' cut across departmental lines and, with rare exceptions, are organized on a national basis.

With the coming into force of the Canada Post Corporation Act on 16 October 1981, four of the certified bargaining agents, the Canadian Union of Postal Workers (CUPW), the Letter Carriers Union of Canada (LCUC), the Association of Postal Officials of Canada (APOC), and the Canadian Postmasters and Assistants Association (CPAA) ceased to play a role in the federal public service as they no longer came under the PSSRA. With 23 391 and 21 106 members respectively, CUPW and LCUC had, until then, been the second- and third-largest bargaining agents in the public service. CUPW had been responsible for the largest number of work stoppages.

The Public Service Alliance of Canada (PSAC) has, from the outset, been the largest bargaining agent in the federal public service. It represents approximately 169 000 employees in 57 bargaining units. The Professional Institute of the Public Service (PIPS) comes next, with a membership of approximately 21 000 employees in 35 bargaining units. The other bargaining agents, as seen in Table 8, represent a considerably smaller number of employees. Bargaining power depends in large measure on the nature of the services performed. The Canadian Air Traffic Control Association (CATCA), for example, with a membership that barely exceeds 2000, wields more clout than most of the others. This is because of its ability to disrupt air traffic, as it has done on a number of occasions, through threatened strikes and slow-downs, or to bring it to a virtual halt by means of a full-scale strike.

In contrast to the multiplicity of bargaining agents on the employee side, the PSSRA gives Treasury Board sole responsibility for bargaining on behalf of the employer for the bargaining units in the 'central administration'. In a few instances where individual departments have a monopoly of employment in a particular bargaining unit, the bargaining has been carried out at a department level, under a mandate from Treasury Board. However, all departmental mandates were withdrawn in the summer of 1980, following settlements with the postal unions. These settlements had been concluded with the intervention of the Postmaster General and went beyond Treasury Board guide-lines. This leaves Treasury Board as the only official spokesman, for purposes of collective bargaining, for units in the 'central administration', although the departments contribute in varying degrees to the preparation for negotiations and representation on bargaining teams. The departments have full responsibility for administering the collective agreements.

The 'separate employers' are responsible for negotiating with their own employees. However, they require the approval of the Governor in Council to enter into their collective agreements. In practice this means that they are required to accept the government's compensation policy on which the negotiating position of Treasury Board is based.

Scope of Bargaining

With the enactment of the PSSRA, the era of unilateral decision making by the government as employer officially came to an end. This did not mean, however, that all terms and conditions of employment would henceforth be subject to negotiation. Statutory limitations on the scope of bargaining, like the dispute-resolution procedures to be discussed below, reflect the determination of the government, when drafting the legislation, to protect its own prerogatives and those of Parliament, with respect to certain policy issues. The PSSRA provides, for example, that no term or condition of employment may be included in a collective agreement if it requires legislative implementation other than the appropriation of money. It specifically excludes any terms and conditions that are established by or under the following four Acts: the Public Service Employment Act, the Public Service Superannuation Act, the Government Employees Compensation Act and the Government Vessels Discipline Act. This exclusion is particularly important in relation to the first two of these Acts, since it means that bargaining cannot take place with respect to the subjects falling under the jurisdiction of the Public Service Commission, that is, recruitment, promotion, transfer, lay-off, discharge for incompetence or incapacity, and rejection during the probation period following recruitment, promotion or transfer.

The limitations on bargaining under the PSSRA are strengthened by a reserved management-rights clause that confirms the employer's right and authority to determine the organization of the public service, to assign duties to positions, and to classify positions. This provision affects, among other matters, such subjects as distribution of work, manning of equipment, determination of duties, and job evaluation. It can be seen that this provision, along with other limitations on the scope of bargaining mentioned above, would preclude negotiations over matters such as job security in the face of technological change. The technological change provision in the CUPW agreement, accepted by the employer under considerable duress, represented a marked departure from the rule.

The PSSRA specifically confirms the employer's right to take whatever action is necessary in the interest of the safety or security of Canada or of any state allied or associated with Canada. In normal times this clause has no significant impact on the scope of bargaining, but could have important implications in a time of war. Of course there is nothing to prevent Parliament, at any time, from overriding a provision of the Act, either with respect to scope of bargaining or with respect to any other right provided under the statute. As noted above, the PSCRA suspended the right to bargain over monetary issues. Earlier anti-inflation legislation (1975) also limited the scope of bargaining by placing a ceiling on negotiated increases. Other legislation, such as the Air Traffic Control Services Continuation Act in 1977 and the Postal Services Continuation Act in 1978, removed the right to strike in particular circumstances. The power of Parliament is supreme.

Consultation: An Adjunct to Formal Negotiating Procedures

The fact that certain items are absent from the public service collective agreements does not necessarily mean that the benefits they represent are lacking. This should be remembered in considering the implications of the limitations on scope of bargaining. We should be ignoring an important element in the relationship between the parties if we failed to take account of some of the consultative mechanisms that have evolved as an adjunct to formal negotiation procedures and, in a real sense, are supplementary to any discussion on the scope of bargaining in the federal public service. The NJC, for example, which was established in 1944 as a forum for consultation on various terms and conditions of employment, excluding remuneration, was preserved, following the adoption of a formal system of collective bargaining, for the discussion of matters beyond the scope of bargaining, as well as matters of service-wide interest, which are bargainable under the Act, but transcend the boundaries of particular bargaining units. A formula has recently been evolved under which agreements reached in the NJC on matters that may be included in a collective agreement shall be binding on the parties. The majority of collective agreements now contain an 'NJC clause' that gives all bargainable items agreed to in NJC the force of the collective agreement. Other forums for consultation provide, for example, for some employee input on decisions relating to the Superannuation Plan and into matters under the jurisdiction of the Public Service Commission.

Dispute Resolution: A Choice of Procedures

Although the PSSRA broke new ground in a number of respects, its most original contribution was its built-in choice of procedures for the resolution of bargaining impasses, including a provision for the maintenance of essential services in the event of a legal strike. The Act requires the bargaining agent to decide on the ultimate method of dispute resolution before serving notice to bargain. Two options are available: reference of a dispute to a conciliation board, with the ultimate right to strike, or binding arbitration. Whichever option is chosen, a conciliation officer may be named to assist the parties prior to the ultimate step in the process. The bargaining agent is bound by its choice of method of dispute resolution for the round of bargaining for which that method has been specified, but may change its option prior to the commencement of negotiations for another collective agreement. The bargaining agent has the sole right of choice of method. The method chosen cannot be vetoed by the employer.

The strike option was made subject to the condition or safeguard that employees engaged in essential services, described in the legislation as 'designated employees', were forbidden to strike. Twenty days after notice to bargain collectively is given by either party, the employer is required to furnish to the PSSRB and to the bargaining agent a list of employees or classes of employees that the employer considers to be 'designated employees'. The bargaining agent is given an opportunity to file objections to the list. Conciliation-board procedures cannot be invoked until agreement has been reached on the list of 'designated employees'. The Act provides, in the absence of agreement between the parties, for the PSSRB to decide on the employees to be designated.

It is evident that the choice of procedure would be determined, to some extent at least, by the bargaining agent's perception of the clout it could exercise in the event of a strike. This choice, in turn, will be affected by the number of employees likely to be designated. Accordingly, to assist the bargaining agent in making a decision on the dispute-resolution option, particularly when a newly certified bargaining agent is involved, the PSSRA gives the bargaining agent the right, before it files its dispute-resolution specification with the PSSRB, to request that the employer furnish to the Board and to the bargaining agent what might be described as a preliminary list of the employees or classes of employees whom the employer *then* proposes for designation. That list is not subject to challenge before the Board. There is also no guarantee that the list will not be revised, perhaps even significantly, by the employer by the time the negotiations reach the point of impasse.

The PSSRA places restrictions on the matters that may be the subject of a conciliation-board report or an arbitral award. This, too, has implications for the bargaining agent's choice of dispute-resolution procedure: the restrictions are stricter, and more strictly applied, in arbitration procedures than in conciliation-board procedures. The general limitations on scope of bargaining apply equally to the report of a conciliation board or an arbitral award. In addition, perhaps for greater certainty, the Act lists a number of matters that may not be included either in a conciliation-board report or in an arbitral award. These are: standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees. Where a bargaining impasse is left to be resolved by arbitration, the Act declares, in addition, that an arbitral award may deal only with rates of pay, hours of work, leave entitlements, standards of discipline, and other directly related terms and conditions of employment. Nor may items not previously dealt with in negotiation be the subject of an arbitral award. This restriction does not apply in the case of a conciliation-board report.

Arbitration of interest disputes was dealt with by a separate tribunal, the Public Service Arbitration Tribunal, until 1975, when amendments to the PSSRA transferred to the PSSRB the arbitration function, as well as the adjudication of grievances, which will be discussed below. Conciliation boards, in contrast, are appointed on an *ad hoc* basis, as they are under private sector legislation. The chairman of the PSSRB is responsible for the appointment of a conciliation board and for giving it its terms of reference.

In formulating the terms of reference for a conciliation board, the chairman of the PSSRB has, on occasion, included proposals that go beyond the scope of bargaining permitted under the PSSRA. In other words, it happens on occasion that the terms of reference given to a conciliation board open the door to discussing with the parties some non-bargainable issues to see if a solution can be found. Such references are always subject to the caveat that the report of the conciliation board should take into account the limitations imposed by the Act, a caution that has not always been observed. Moreover, in the absence of an expeditious procedure to ensure that the recommendations in conciliation-board reports conform to their terms of reference, the employer, on some occasions, has been induced to make concessions on non-negotiable matters in the course of conciliation-board proceedings, especially when dealing with bargaining agents who wield particular clout. This happened, for example, on the issue of technological change in conciliation-board proceedings involving CUPW. If the Board were to make similar concessions in an arbitral award, the decision would likely be reversed by the courts as constituting an excess of jurisdiction. Accordingly, although bargaining agents that have opted for arbitration have managed to embody in their agreements, *through negotiation*, some terms and conditions that do not fall within the scope of arbitration, the arbitration process is actually more limited in scope, both in law and in practice, than are conciliation-board procedures.

Grievance Process

Like most of the labour legislation in Canada, the PSSRA makes provision for the handling of grievances that arise during the term of a collective agreement and prohibits strikes for the period that a collective agreement is in effect. However, although there are almost no restrictions on the matters on which a grievance may be raised, the only grievances that may be referred to arbitration — or 'adjudication', to use the technical language of the Act — are those arising out of a collective agreement or arbitral award or out of certain types of disciplinary action. Discharge for other than disciplinary reasons — for incompetence or incapacity, for example — comes under the provisions of the Public Service Employment Act and is therefore not subject to the adjudication provisions of the PSSRA. This distinction has implications for job security as it is obvious that the reason for discharge would be defined by the employer. Occasionally, however, the PSSRB has taken jurisdiction on a request for adjudication when, on examination of the facts, it has found that a discharge, though ostensibly for another reason, was, in fact, a disciplinary discharge. The decisions of the Board in these and other matters for which it is responsible in the administration of the Act are discussed in detail in the text.

The PSSRA: Law and Practice

This study has examined the PSSRA in detail. We have sought to ascertain how the parties have accommodated themselves to the legislation and the problems they have encountered in adapting to its provisions. We have looked at the factors affecting the negotiating position of the parties and analysed the outcome of their negotiations. We have compared wage developments under the collective-bargaining regime in the federal public sector with developments in other sectors and have made like comparisons of contract clauses. In addition we have identified some of the compensation issues that are peculiar to the public sector and others that may be looming on the horizon. We have examined the way in which the authorities charged with administering the law have interpreted that law and, in the process, have breathed life into it. We have taken note of cases of judicial review of PSSRB decisions and the implications of the review. We have considered the factors motivating the choice of procedures for dispute resolution and examined the experience with these procedures. We have looked at the experience with grievance procedure, the matters that may go to adjudication, and some of the major decisions related to that process. We have also examined the way in which infractions of the law have been dealt with by the Board and, occasionally, by the courts. In treating issues with policy implications, we have discussed the recommendations of various public inquiries that have dealt, in whole or in part, with labour relations in the federal public service.

Conclusions and Recommendations

In assessing the experience under the PSSRA, it is essential to bear in mind that both parties had to accommodate themselves to a system that was entirely new at the time the law was enacted. With few exceptions, they entered the collective bargaining regime without negotiating experience. Both parties had to build a cadre of negotiators 'from scratch'. In the early days after the legislation came into force, negotiators for both sides were senior officials who knew one another well; many of them had been involved in establishing the system and had a stake in getting it under way successfully. Before long, however, many of the negotiators on the employer side were recruited from the private sector, as were a large number of managers responsible for administering collective agreements at various levels within departments. Most of these people brought harder-line attitudes to labour-management relations and, consequently, to the bargaining table than had been evident in earlier rounds of bargaining. Employee expectations, raised by initial 'catch-up' settlements, were not as easily satisfied in subsequent negotiations. If we add to the very considerable difficulties faced by both parties in adapting to a totally new relationship the fact that most of the negotiations since the early 1970s have been carried on in a difficult economic climate — a climate involving wage restraints, wage controls and, most recently, an economic recession — it is perhaps remarkable that the system has worked as well as it has.

Accomplishments and Concerns

Collective bargaining has, indeed, produced numerous benefits for federal employees, most of which are reflected in collective agreements; some have been achieved in the NJC. The gains have been made, moreover, without the wheels of government grinding to a halt or the federal treasury becoming bankrupt. Of the occasional disruptions in service that have occurred, a large number have been in the Post Office, where, it should be remembered, strikes were not unknown before the law allowed them. As for wages, few collectively negotiated agreements have produced the advantage over the private sector that some predicted they would, and that others still believe that they do. Our analysis of wage developments shows that the perception of inflationary settlements in the public sector is based largely on the experience at the provincial level, particularly in the parapublic services.

The fact that the system has worked well on balance and, accordingly, may be considered basically sound does not mean that there are no problems. There are clearly shortcomings in the law and in its application that leave something to be desired. The climate, on the eve of the controls legislation, gave little ground for complacency. The impact of the PSCRA, however justified by economic conditions, is now cause for further concern.

The suspension, however temporary, of most aspects of the collective bargaining regime that had been established by the PSSRA, the unprecedented interference with collective agreements that had been reached through a process of negotiation, and a perception by the bargaining agents that considerations of equity were neglected by their employer, acting as legislator, in developing the program, could have serious implications for the long-term relationship between the parties. We urge the parties to do their utmost to ensure that the system survives the current difficulties. In particular we urge the policy makers to correct some long-neglected deficiencies in the PSSRA in time for the resumption of normal negotiations when the PSCRA expires.

We find it hardly surprising that in the light of experience, some changes would be indicated to a statute which, at the time it was enacted, represented such a highly innovative experiment. What is more surprising is that there have been no amendments of a substantial nature to the PSSRA in the sixteen years that it has been in effect. This is in contrast to the private sector legislation and to the public sector legislation in some of the provinces, which have been amended on more than one occasion in the same period.

Some of the problems that have been identified in this and other studies are of interest primarily to the parties and/or the administrators of the law. Others — in particular, dispute resolution — are clearly of concern to the public. Some may be more amenable than others to solution by legislative amendment. Some may be virtually inherent in the system, but may well be alleviated with effort. Examples of problems in the latter category are those related to the political nature of the government employer, the diffuse structure of bureaucratic authority, the size and diversity of the public service, and the different interests of the centre and the parts, that is, Treasury Board and the operating departments. These have all been discussed at length in the text. Problems that have emerged in administering the law and that indicate a need for statutory amendment have also been dealt with in detail, as have the numerous recommendations for change by various public inquiries, one of which was conducted by one of the co-authors of this study. The problems that call for the most urgent attention, and some general observations and recommendations that follow, may be summarized under a number of subject headings.

Bargaining-Unit Structure

The bargaining-unit structure envisaged in the PSSRA and implemented in the original certifications was interesting and innovative at the time of its enactment and facilitated the rapid development of the system. In practice, however, the multiplicity of bargaining units has become burdensome to the larger bargaining agents as well as to Treasury Board, for whom bargaining is now almost a constant process. There is a growing consensus that a reduction in the number of bargaining units would be desirable. For one thing, such a reduction would eliminate the duplication of time and effort spent in negotiating similar or identical clauses for inclusion in separate agreements, as presently so often happens. For another, it would reduce the potential for sequential interruptions of service in case of a breakdown in negotiations.

There seems to be general agreement that co-ordinated, or coalition, bargaining should be encouraged where possible, particularly on matters of common interest. Negotiations in the NJC are a commendable step in this direction. But some amendments to the law are also in order. We consider it essential to eliminate any impediments to the consolidation of bargaining units under the existing legislation. This is not to say that the consolidation of bargaining units is necessarily desirable in all instances. The advantages and disadvantages of consolidation would have to be weighed carefully by the responsible authorities and by the parties. The law should give to the PSSRB authority to facilitate the consolidation of bargaining units where it is shown that to do so in any particular case would be in the public interest.

Bargaining-Unit Exclusions

The present language setting out the criteria for the exclusion of certain persons from the collective bargaining provisions of the legislation has resulted in numerous arguments over technical wording and led to constant bickering between the parties. This result is evident from some of the cases we have discussed in the text. The situation has engendered suspicion in the minds of bargaining agents that some employees are being classified as persons employed in a managerial or confidential capacity, not because of the functions they perform, but in order to maintain a core of excluded persons to keep the operation going in case of a strike. The manner in which grievance-officer exclusions have been handled by the employer, for example, has reinforced that suspicion. The bargaining agents, on the other hand, have been able to exert undue power to hold up decisions because of built-in delays in the procedure. The issue of exclusions and the procedures for determining them must clearly be addressed by the policy makers.

Scope of Bargaining

Our analysis of contract clauses shows that bargaining agents in the federal public service have succeeded in negotiating many items that are standard in the private sector and that they enjoy benefits, outside negotiated agreements, on a number of other items. They have also achieved some negotiated benefits far ahead of the private sector: maternity and other family-related benefits, severance pay, education leave, and various professional privileges, to mention just a few. Job-security provisions, however, are conspicuous by their absence because of statutory limitations on the scope of bargaining.

While it is generally agreed that some items must remain outside the ambit of bilateral determination when a government is the employer, the limitations on scope of bargaining under the PSSRA have been recognized by a number of public inquiries as too restrictive, as have the corollary limitations on access to adjudication, particularly in the case of termination of employment. It is clear to us that the scope of bargaining could be broadened with respect to certain matters presently excluded, without threatening the power of the government to govern and without undermining the 'merit principle'. Other limitations must remain. We suggest that consideration be given to bringing within the bargaining arena, in some form, some aspects of the authority that now lies within the jurisdiction of the Public Service Commission and the Treasury Board; these might include, but should not be limited to, criteria for lay-off, technological change, classification standards, and performance evaluation.

Grievances and Adjudication

If the scope of bargaining were broadened, as recommended above, the opportunity to file grievances and, more particularly, to carry them to adjudication, would be considerably enlarged. It is clear that the system must be capable of handling all legitimate complaints, and that this capability must be perceived by the employees concerned if a better climate of labour relations is to be achieved. The question of access to adjudication becomes particularly acute in the case of termination of employment. As the law now stands, the reason for termination, as defined by the employer, in some instances determines the recourse available. On a matter of such vital importance to an employee, the present system can be confusing, expensive and unfair. We urge strongly that relevant statutes be amended to make all cases of termination of employment subject to the same process, that is, adjudication by the PSSRB.

The Resolution of Interest Disputes

With the establishment of Canada Post as a Crown corporation, the source of some of the highest-profile labour disputes has been removed from the public service. Whether the problems reflected in these disputes will be more amenable to solution under the Canada Labour Code, only time will tell. And whether the departure of the Post Office from the federal public service will mean fewer problems in this sector, or whether other problems will arise to fill the gap they leave, again only time will tell. There is surely no shortage of problems at the moment or for the foreseeable future. The question of dispute resolution has been paramount among these problems, and will undoubtedly remain so when the PSCRA, which has temporarily suspended the right to strike, ceases to have effect.

The initial choice of impasse procedures was heavily in favour of the arbitration option, as the policy makers had expected and hoped. That a significant number of bargaining units have since switched their original option, with the result that the majority of employees in the federal public service are presently committed to the conciliation-board route, indicates that the confidence in arbitration was short lived. There have been signs of a steady, perhaps even dramatic, trend towards militancy in groups where it might originally have been least expected. With the encouragement of some new leaders, even the most traditionally docile groups seemed to be deciding, when the collective bargaining regime was still in effect, that the time for a change in tactics had come. This raises some serious policy problems for the post-controls period, problems the policy makers would do well to address in advance. For while the PSCRA may postpone the consequences that flow from this development, there is a strong possibility that a high level of militancy will characterize the relationship between the parties once the restraint period has come to an end. It would be a serious mistake to put the problem of dispute resolution aside for consideration at some distant future date.

We believe that the movement away from the arbitration option has been regrettable. We urge the policy makers to make every effort to halt, or preferably reverse, the trend. The goal must be to make the arbitration option more palatable to the bargaining agents. The option must not only be fair, but *perceived* by them to be fair. This is not so as matters stand now. As a step towards making the arbitration option more palatable to the bargaining agents, we propose that the scope of arbitration be broadened to bring it into line, as far as possible, with the scope of matters that are bargainable.

A serious policy problem relating to dispute resolution flows from the 'designation' provision which, as the quid pro quo for the right to strike, was one of the most innovative features of the PSSRA. There have been differences between the parties from the outset concerning the number of employees to be designated in particular circumstances and the tasks that designated employees should be required to perform. It has also become apparent in the light of experience that there are deficiencies in the designation provision itself, in particular the rather narrow definition of the services to be protected and the lengthy procedure for designation. These deficiencies clearly call for amendments to the law. However, in spite of deficiencies in the legislation and differences relating to its application, it appeared until recently that a *modus vivendi* had been reached that was reasonably acceptable to both sides.

The PSSRB has always been faced with a difficult task in interpreting and applying the designation provision. It declared at the very outset that if it erred at all, it preferred to do so on the side of caution. In other words, in case of doubt, it would rather designate too many employees than too few. Indeed, in the last few years, the PSSRB has gone beyond the strict literal language of the law by holding that certain social services, such as the services of clerks processing welfare and welfare-related cheques, fell within the expression 'the safety or security of the public'.

The recent case concerning the air-traffic controllers is the first instance where the policy that the parties themselves followed for over a decade and on which the PSSRB has based its decisions on designation has been brought into serious question by the employer. The 'CATCA case', as it is popularly known, appears to reflect a significant change in the employer's philosophy concerning the right to strike in certain services. A few historical details may be in order to illustrate this point.

In the first designation case that came before the PSSRB — an air-traffic control case in 1968 — the employer had limited its proposals for designation to air-traffic controllers engaged in what might be broadly described as 'emergency or hazardous situations'. In addition the employer undertook *in its proposals* to suspend all traffic-control services relied on chiefly by commercial airlines. A similar undertaking was given by the employer in every round of bargaining for employees in the air-traffic control unit until 1980, when, on the eve of negotiations for the air-traffic-control unit, the Minister of Transport announced that all government aerodromes and air stations were to "remain operational at all reasonable times", in other words, even in the event of a strike by employees in the air-traffic control unit. In light of this decision, the employer proposed that in the event of a strike by employees in that unit, all operational air-traffic controllers would be required to perform their regular duties. Since it was a matter of government policy to keep all commercial air traffic operational, all operational air-traffic controllers had become essential to the "safety or security of the public", the criterion for designation under the PSSRA. The employer's list of more than 1700 designations, as compared with approximately 200 in previous rounds, was challenged by the bargaining agent. The Board held unanimously in a preliminary decision that it was not bound to take into account ministerial or government pronouncements on the level of services to be maintained. It found, instead, that implicit in making its determination on the number or classes of air-traffic controllers to be designated was the requirement that it decide the level of services by air-traffic controllers that must be maintained at federal government airports in order to ensure the safety and security of the public in the event of a lawful strike by members of the unit. The Board's decision was set aside by the Federal Court of Appeal which found, in part, that the Board had no right, under the Act, to determine the level of services, since that matter was a policy decision for which the government alone was responsible. The judgment of the Federal Court of Appeal was upheld by the Supreme Court of Canada.

It is our view that the government used the designation provision in the CATCA case to implement a change in policy relating to the air-traffic controllers' right to strike, and that it made the change in this way rather than doing so openly by the introduction of an amendment to the law, which would have called for a debate in Parliament on the principle involved. The CATCA case has complicated the already difficult task faced by the PSSRB in interpreting and applying the designation provision. Past agreements of the parties and past decisions of the Board can no longer be relied on for guidance. The courts' decisions can be expected to have an impact on designations in many other units as well as the air-traffic-control unit: for example, electronics, radio operations, firefighting, meteorology, clerical and regulatory duties, and data processing. But while the courts' decisions have created a whole new 'ball game' for designation under the PSSRA, it is unlikely that they have resolved the designation issue once and for all. We urge that the law be clarified at the earliest opportunity with respect to the designation principle and its implications for the right to strike since the courts have ruled, in effect, that the right to strike under the PSSRA, as presently worded, is not necessarily a right in practice. Again, if the policy on which the government seems to have embarked prevails, it is of the utmost importance that a bargaining agent should be permitted to alter its option from reference to a conciliation board to reference to arbitration at any stage of the process. Otherwise, if a large number of employees are designated and the capacity of a bargaining agent to conduct an effective legal strike is destroyed, the bargaining agent would be deprived of any effective method in law for resolving an impasse in negotiations.

Finally, on the subject of dispute resolution, it has become clear in the light of experience that the public employer should have the right to lock out as a counterpart to the employees' right to strike. This issue first came to the fore in the federal public service with rotating strikes in the Post Office. Mail service was virtually paralysed at minimal cost to the union. Some other bargaining agents now appear to be suggesting similar tactics. The bargaining agents cannot have it both ways.

Unfair Practices

Delays and inconsistency in dealing with non-compliance with the law can only be counter-productive. Accordingly it is our view that all offences under the legislation should be handled by the PSSRB. The delays encountered in seeking leave to prosecute, as required by the present legislation, and the inconsistent handling of cases by provincial judges, who find the procedure distasteful, are reason to keep these matters in the hands of the Board. The nominal fines imposed by the courts following interminable proceedings have not been a deterrent in such instances. Not that we are suggesting substantial minimum fines. Circumstances have to be taken into account in each case. We are convinced that the Board is in the best position to understand the issues involved and to judge the circumstances of each case.

The employer's reluctance in the past, and indeed until fairly recently, to seek enforcement of the provisions of the PSSRA with regard to unlawful strikes, especially those engaged in by designated employees, has encouraged some employees to flout the law. Designated employees or their fellow employees in the same unit must remember that but for the designation principle, they would never have been granted the right to strike. In some instances where the employer has sought leave to prosecute or to impose disciplinary action in case of a strike, there has been a long delay between the occurrence of the alleged offence and the initiation of the appropriate proceedings or action. Such delays can only serve to cause acrimony when the 'offence' seems to have been 'forgiven'.

The Need for Consistent Management Practices

Some problems that have emerged in the course of this study, though not amenable to solution by changes in the law, nevertheless require serious attention by the policy makers. Inconsistencies in policy and practice, in particular, can undermine the credibility of the system and damage the relationship between the parties. These inconsistencies are in urgent need of correction. Examples at the negotiating stage are not hard to find. The perception by the bargaining agents of different treatment for different groups, depending on the clout they wield, is not conducive to a healthy bargaining climate. The need for consistency and for a perception of consistency by those affected cannot be overemphasized. The same is true for the administration of the agreement.

It is evident that the provisions of a collective agreement are not interpreted in uniform style throughout the public service. The difficulty of applying a centrally negotiated agreement in far-flung locations and different departments calls for far greater co-ordination of policy than presently exists. We recommend that as soon as a collective agreement is signed, the employer undertake a more comprehensive program of education than is currently the practice. Managers responsible for labour relations should be instructed on the meaning of the collective agreement; they should, in fact, be brought together to discuss its meaning, particularly in relation to disciplinary matters. Inconsistent standards of discipline and lack of consistency in the enforcement of discipline can only be counterproductive, as can the rigid application of disciplinary procedures, frequently on the basis of Treasury Board directives, regardless of local circumstances. Both situations should be avoided. For a satisfactory relationship to develop, managers must be able to combine consistency and flexibility. An ongoing educational program should have as its goal the training of labour-relations managers with sufficient knowledge of government policy to apply that policy consistently, and sufficient understanding of human relations to be flexible where circumstances warrant.

Abrégé

L'extension du droit de négociation collective aux employés de l'État : un phénomène relativement récent

Le niveau d'organisation est plus élevé parmi les employés de l'État que dans n'importe quel autre secteur de l'économie. Presque la totalité des employés des gouvernements fédéral et provinciaux admissibles à une négociation collective sont membres d'organisations d'employés et sont régis par des conventions collectives. Il s'agit pourtant des plus jeunes intervenants sur la scène de la négociation collective.

Voilà déjà longtemps que l'on prend pour acquis, au Canada, que les employés des gouvernements municipaux ainsi que les travailleurs d'une variété d'autres services publics, y compris plusieurs commissions et organismes fédéraux et provinciaux, ont droit à une négociation collective du genre de celle qui se pratique dans le secteur privé. Pourtant il y a moins de vingt ans encore, le gouvernement fédéral et toutes les provinces sauf une s'opposaient toujours à accorder de tels droits à leurs propres employés. La province de la Saskatchewan représentait une exception : dès 1944, un gouvernement socialiste avait adopté sa première loi sur le travail, la *Trade Union Act*, qui visait aussi ses propres employés, sans réserve.

Afin de justifier les décisions unilatérales prises par les gouvernements en tant qu'employeurs (sauf toujours le gouvernement de la Saskatchewan), on invoquait essentiellement le principe de la souveraineté de l'État. Ce n'est qu'au début des années 1960 que l'on a vraiment contesté ce principe. Toutefois, les événements se sont par la suite bousculés. En fait, cette modification des attitudes des employés de l'État envers la négociation collective représente un des développements les plus importants des relations industrielles des dernières années. En 1965, plus de vingt ans après l'initiative de la Saskatchewan, mais à peine une année après que le premier ministre du Québec, Jean Lesage, eut déclaré catégoriquement que « la Reine ne négocie pas avec ses sujets », le gouvernement du Québec a devancé toutes les autres provinces ainsi que le gouvernement fédéral en accordant aux employés de sa fonction publique des droits de négociation collective étendus, y compris le droit de grève. Le gouvernement fédéral a emboîté le pas en 1967, le Nouveau-Brunswick en 1968 et la Colombie-Britannique en 1973. Terre-Neuve avait censément accordé le droit de grève aux employés de l'État dans le cadre d'une loi sur les relations de travail dans la fonction publique adoptée tout d'abord en 1970, mais, jusqu'à son amendement en 1973, cette loi imposait des limites beaucoup plus étroites à l'exercice de ce droit qu'il n'en existait dans les autres juridictions. Les autres provinces ont toutes accordé les droits de négociation à leurs propres employés, tout en remplaçant le droit de grève par l'arbitrage dans le cas de conflits non réglés.

Les particularités du secteur public : un problème de politique

En accordant les droits de négociation aux employés de l'État, on semble généralement avoir accepté devoir tenir compte de certaines différences fondamentales entre l'employeur public et l'employeur privé, en particulier de la responsabilité primordiale de l'employeur public en matière d'intérêt public. C'est ainsi que le gouvernement fédéral et toutes les provinces, exception faite de la Saskatchewan, ont adopté des dispositions particulières visant leurs propres employés, le plus souvent dans des lois distinctes qui leur accordaient le droit de négocier. Un examen de ces lois révèle cependant l'existence d'importantes différences d'orientation entre les diverses juridictions relativement au mécanisme le plus apte, à chaque étape du processus, à adapter les droits dont jouissent les travailleurs du secteur privé ainsi que ceux de plusieurs services publics aux caractéristiques et aux responsabilités particulières des employés des échelons supérieurs de l'État.

La raison d'être et la portée de l'étude

Puisque le Canada possède aujourd'hui une expérience considérable qui englobe une vaste panoplie d'options politiques, il semble opportun de les approfondir afin d'en cerner les conséquences. Nous avons consacré ces deux volumes à l'expérience fédérale, et ce pour plusieurs raisons : les dispositions innovatrices de la Loi sur les relations de travail dans la fonction publique (LRTFP); le grand nombre d'employés que cette Loi vise dans toutes les régions du pays et même, dans le cas du service extérieur, à l'étranger; l'ampleur et la variété de l'expérience dans plusieurs rondes de négociations depuis l'entrée en vigueur de la Loi; et l'influence considérable que cette Loi a exercé sur les lois qui ont suivi. La recherche est déjà commencée en vue d'une deuxième œuvre qui consistera en un examen approfondi et une analyse détaillée des relations de travail dans les secteurs publics provinciaux.

Il est ironique que la plupart des aspects du régime de négociation collective qui intéresse cette étude aient été suspendus suite à l'adoption de la Loi sur les restrictions salariales du secteur public (LRSSP) peu de temps après la présentation de notre manuscrit à l'éditeur. La LRSSP a en fait placé les négociations salariales « en attente » dans la fonction publique fédérale ainsi que dans les autres secteurs qu'elle vise pour une période d'environ deux ans à partir de la fin de juin 1982. Cet événement nous a obligés à effectuer quelques révisions au manuscrit sans toutefois porter atteinte à nos conclusions générales et à nos recommandations qui se fondent sur l'hypothèse que la LRSSP sera abrogée et que l'on permettra que la négociation collective reprenne comme avant, suite à la période prévue par la Loi.

La Loi sur les relations de travail dans la fonction publique

On a qualifié d'« expérience audacieuse » l'adoption de la LRTFP en 1967. La Loi remplaçait un régime unilatéral pour la détermination de la plupart des conditions de travail des fonctionnaires fédéraux par un régime bilatéral en vertu duquel les employés obtenaient une participation importante à la détermination de ces conditions.

Le champ d'application de la Loi

La LRTFP régit les relations de travail dans les ministères du gouvernement fédéral, soit l'« administration centrale », ainsi que dans plusieurs bureaux, quelques commissions et certains organismes tels que le Conseil national de recherches du Canada, le Conseil de recherche en sciences humaines du Canada, l'Office national du film, la Commission d'énergie du Nord canadien et quelques autres que l'on qualifie d'« employeurs distincts ». En vertu de la Loi, les employés de certains employeurs sont exclus de la négociation collective. Cette exclusion vise, par exemple, les employés de la Commission des relations de travail dans la fonction publique (CRTFP), le tribunal indépendant responsable de l'application de la Loi, les employés du Sénat, de la Chambre des communes et de la bibliothèque du Parlement, les membres des Forces armées et de la Gendarmerie royale. Les personnes recrutées sur place hors du Canada, les personnes dont la rétribution consiste en honoraires, les employés à temps partiel qui d'ordinaire ne sont pas astreints à plus du tiers de la durée normale de travail, et les personnes employées à titre occasionnel et qui n'ont pas été employées pour une période de plus de six mois échappent aussi à la définition d'employés en vertu de la Loi et, par conséquent, ne jouissent pas des droits de négociation.

Comme c'est le cas également dans la plupart des lois du travail régissant le secteur privé, les personnes préposées à la gestion ou à des fonctions confidentielles ne sont pas admissibles à la négociation collective. Aux termes de la LRTFP, la définition d'une personne préposée à la gestion ou à des fonctions confidentielles comprend deux parties : premièrement, les personnes qui occupent un poste de confiance auprès de cadres supérieurs particuliers, soit au gouvernement ou dans les tribunaux fédéraux, et les personnes employées en qualité de conseillers juridiques au ministère de la Justice; deuxièmement, les personnes qui ont des fonctions ou des responsabilités de direction en ce qui a trait à l'établissement et à l'application des programmes du gouvernement, et des personnes dont les fonctions comprennent celles d'un administrateur du personnel ou qui, par leurs fonctions, sont directement impliquées dans le mécanisme de la négociation collective pour le compte de l'employeur ou qui sont tenues de s'occuper officiellement, pour le compte de l'employeur, des griefs ainsi que les personnes qui occupent un poste de confiance auprès de l'une des personnes sus-mentionnées. Lorsqu'un désaccord survient au sujet de ces exclusions, la LRTFP stipule, tout comme dans le cas de la loi sur les relations de travail dans le secteur privé, que la question sera tranchée par un tribunal indépendant, en l'occurrence la CRTFP.

La création d'un régime bilatéral de relations de travail

Dans le secteur public comme dans le secteur privé, la détermination d'une unité de négociation appropriée et la certification d'un agent négociateur représentatif constituent des prérequis à la négociation collective. Dans le secteur public, il est également essentiel de préciser qui représentera le gouvernement, en sa qualité d'employeur, aux fins des négociations collectives. Dans la fonction publique fédérale, c'est la Loi qui tranche cette question, tandis que l'accréditation des agents négociateurs représentant les employés relève de la CRTFP.

La CRTFP doit s'assurer que l'association qui demande l'accréditation est une association d'employés aux termes de la LRTFP et qu'elle représente la volonté de la majorité des employés dans une unité habile à négocier collectivement. Toutefois, même si la Commission est responsable de décider de l'habileté de l'unité de négociation, elle doit le faire conformément à des lignes directrices stipulées dans la Loi. Ces lignes directrices, axées sur les catégories et les groupes professionnels, représentent un des aspects les plus innovateurs de la Loi. Elles ont été conçues, en partie, de manière à assurer une certaine conformité entre le groupe d'employés auquel s'applique une certaine échelle de salaires ou un certain ensemble de conditions de travail et le groupe d'employés au nom duquel un certain agent négociateur aurait le droit de parler. Elles ont aussi été conçues de manière à ouvrir la voie à une introduction ordonnée d'un régime de négociation collective en évitant les arguments inévitables qui surviendraient si des associations concurrentes étaient libres d'imposer à la Commission une variété de principes qui détermineraient la composition des unités de négociation. La Loi mentionne spécifiquement cinq catégories d'occupations : l'emploi scientifique et professionnel, l'emploi technique, l'administration et le service extérieur, le soutien administratif et l'exploitation. Pour l'administration centrale, on a précisé plusieurs groupes d'occupations au sein de chaque catégorie d'occupations : il en existe un total de soixante-douze. Au cours de la période initiale d'accréditation, du 13 mars 1967 au 30 septembre 1969, la Commission ne devait accréditer l'unité de négociation que si elle était formée de tous les employés d'un groupe d'occupations ou des employés autres que les employés dont les fonctions comprennent la surveillance d'autres employés de ce groupe d'occupations ou des employés d'un groupe d'occupations dont les fonctions comprennent la surveillance d'autres employés de ce groupe d'occupations. Des quelques unités de surveillance qui ont été accréditées, toutes sauf une se rangeaient dans la catégorie d'exploitation. Depuis lors, on a inséré cette dernière dans une unité de personnel non-surveillant. Dans les autres catégories, on a en pratique rangé le personnel surveillant et le personnel non-surveillant dans la même unité de négociation.

Le fait que, deux ans après l'entrée en vigueur de la LRTFP, 95 % des employés faisaient partie d'unités de négociation pour lesquelles un agent négociateur avait été accrédité indique que le processus d'accréditation s'est déroulé rapidement. On peut aussi expliquer la rapidité de l'accréditation des unités de négociation, dans une grande mesure, par l'importance de l'organisation qui existait déjà lorsque la Loi est entrée en vigueur. La plupart des agents de négociation existaient, sous une forme ou une autre, longtemps avant l'adoption de la loi sur les négociations. En fait, on les reconnaissait en quelque sorte implicitement de par leur adhésion au Conseil national mixte (CNM), où ils participaient, depuis 1944, à des consultations officieuses avec l'employeur.

En septembre 1981, on avait accrédité comme agent négociateur dans la fonction publique fédérale 19 associations d'employés. Elles représentaient 122 unités de négociation dont 81 se composaient d'employés de l'« administration centrale »; le reste était réparti entre les « employeurs distincts ». (Voir le tableau 8.) Ces unités de négociation regroupent un vaste éventail d'occupations, des travailleurs manuels relativement peu qualifiés au bas de la hiérarchie professionnelle au personnel technique et professionnel fort qualifié ainsi qu'aux agents du service extérieur au haut de l'échelle. En raison de leur structure d'occupations, la grande majorité des unités de négociation de l'« administration centrale » recrutent leurs membres dans plus d'un ministère et, à de rares exceptions près, sont organisées à l'échelle nationale.

Avec l'entrée en vigueur de la Loi sur la Société canadienne des postes le 16 octobre 1981, quatre des agents de négociation accrédités, le Syndicat des postiers du Canada (SPC), l'Union des facteurs du Canada (UFC), l'Association des officiers des postes du Canada (AOPC) et l'Association canadienne des maîtres de postes et adjoints (ACMPA), ont cessé de jouer un rôle dans la fonction publique fédérale puisqu'ils ne sont plus assujettis à la LRTFP. Avec leurs 23 391 et 21 106 membres respectivement, le SPC et l'UFC représentaient le deuxième et le troisième plus important agent négociateur de la fonction publique. Le SPC avait été l'instigateur du plus grand nombre d'arrêts de travail.

Dès ses débuts, l'Alliance de la fonction publique du Canada (AFPC) est l'agent négociateur le plus important de la fonction publique fédérale. Elle représente environ 169 000 employés dans 57 unités de négociation. L'Institut professionnel du service public du Canada (IPSP) vient en deuxième avec environ 21 000 membres répartis dans 35 unités de négociation. Les autres agents négociateurs, comme l'indique le tableau 8, représentent un nombre beaucoup plus restreint d'employés. Le pouvoir de négociation dépend pour une bonne part de la nature des services rendus. L'Association canadienne du contrôle du trafic aérien (ACCTA), par exemple, bien qu'elle ne compte qu'un peu plus de 2 000 membres, jouit d'un plus grand pouvoir que la plupart des autres. Ce pouvoir découle de sa capacité d'enrayer le trafic aérien, comme elle l'a fait, à quelques occasions, par le biais de menaces de grève et de ralentissement de travail, ou de l'arrêter, à toutes fins utiles, au moyen d'une grève.

Par contraste avec la multiplicité d'agents négociateurs du côté des employés, la LRTFP accorde au Conseil du Trésor l'entière responsabilité de la négociation au nom de l'employeur pour les unités de négociation de l'« administration centrale ». Dans les quelques cas où certains ministères exerçent un monopole sur l'emploi dans une certaine unité de négociation, la négociation a eu lieu au niveau du ministère en vertu d'un mandat du Conseil du Trésor. Toutefois, suite au règlement avec les différents syndicats des postiers à l'été 1980, tous les mandats ministériels ont été retirés. Ces règlements avaient été conclus suite à l'intervention du ministre des Postes et outrepassaient les lignes directrices du Conseil du Trésor. Le Conseil du Trésor reste donc le seul porte-parole officiel, à des fins de négociation collective, pour les unités de l'« administration centrale », bien que les ministères contribuent à des degrés divers à la préparation des négociations et à la représentation sur les équipes de négociation. Les ministères sont pleinement responsables de l'administration des conventions collectives.

Les « employeurs distincts » sont responsables de négocier avec leurs propres employés. Toutefois, ils doivent obtenir l'approbation du Gouverneur en Conseil avant de signer leur convention collective. En pratique, cela veut dire qu'ils doivent accepter la politique de rémunération du gouvernement sur laquelle se fonde la position de négociation du Conseil du Trésor.

Le champ d'application de la négociation

L'adoption de la LRTFP a mis un terme officiel à l'époque de la décision unilatérale par le gouvernement en qualité d'employeur. Cela ne signifiait toutefois pas que l'on pourrait désormais négocier toutes les conditions de travail. Des limites statutaires au champ d'application de la négociation, telles que les dispositions applicables au règlement des conflits dont il sera question ci-dessous, témoignent de la détermination du gouvernement, lors de la rédaction de la Loi, de protéger ses propres prérogatives ainsi que celles du Parlement quant à certaines questions de politique. La LRTFP précise, par exemple, qu'une convention collective ne peut prévoir aucune condition d'emploi qui exigerait l'adoption ou la modification de quelque loi par le Parlement sauf aux fins d'affecter les crédits nécessaires à sa mise en œuvre. La loi exclut spécifiquement les négociations relatives aux conditions fixées par une des lois suivantes ou en conformité avec elles : la Loi sur l'emploi dans la fonction publique, la Loi sur la pension de la fonction publique, la Loi sur l'indemnisation des employés de l'État et la Loi sur la discipline à bord des bâtiments de l'État. Cette exclusion revêt une importance particulière en ce qui a trait aux deux premières lois, puisqu'elle a pour effet d'exclure la possibilité de négociation sur des sujets relevant de la compétence de la Commission de la fonction publique, tels que l'embauchage, les promotions, les mutations, les mises en disponibilité, les renvois pour incompétence ou incapacité et les renvois durant la période de probation qui suit l'embauchage, la promotion ou la mutation.

Les dispositions relatives aux droits de l'employeur qui confirment le droit et l'autorité que possède l'employeur de déterminer comment doit être organisée la fonction publique, d'attribuer des fonctions aux postes et de classer ces derniers ajoutent du poids aux limites à la négociation en vertu de la LRTFP. Ces dispositions touchent, entre autres, la répartition des tâches, la manutention du matériel, l'établissement des tâches et l'évaluation du rendement. On peut voir que ces dispositions, conjuguées aux autres limites au champ d'application de la négociation mentionnées ci-dessus, empêcherait des négociations relatives à des sujets tels que la sécurité d'emploi face aux changements technologiques. La disposition relative aux changements technologiques dans la convention du Syndicat des postiers, acceptée avec forte résistance par l'employeur, marquait une exception à la règle.

La LRTFP confirme clairement le droit de l'employeur de prendre les mesures nécessaires dans l'intérêt de la sureté ou de la sécurité du Canada ou de tout état allié ou associé au Canada. En temps normal, cet article n'exerce pas une grande influence sur le champ d'application des négociations, mais ses implications pourraient être sérieuses en temps de guerre. Évidemment, rien n'empêche le Parlement, à tout moment, d'annuler une disposition de la Loi, qu'il s'agisse de la portée de la négociation ou de tout autre droit garanti par la Loi. Comme on l'a mentionné ci-dessus, la LRSSP a suspendu le droit de négocier les questions pécunières. Auparavant, la Loi anti-inflation (1975) avait aussi limité la portée des négociations en plafonnant les augmentations négociées. D'autres lois, telles que la Loi sur le maintien des services du contrôle de la circulation aérienne (1977) et la Loi sur le maintien des services postaux (1978) interdisaient la grève dans certaines circonstances particulières. Le pouvoir du Parlement est suprême.

La consultation : un complément au processus de négociation officiel

Le fait que certains éléments soient absents des conventions collectives de la fonction publique ne signifie pas nécessairement qu'on ne jouit pas des avantages qu'ils procureraient. Il est bon de garder cela en mémoire lorsqu'on examine les implications des limites au champ d'application de la négociation. On passerait à côté d'un élément important de la relation entre les parties s'il fallait ignorer certains des mécanismes de consultation qui ont évolués parallèlement aux négociations officielles et qui revêtent un caractère réellement complémentaire dont il faut tenir compte dans toute discussion du champ d'application des négociations dans la fonction publique fédérale. Le CNM, par exemple, qui a été créé en 1944 comme forum de consultation sur de nombreuses conditions d'emploi, exception faite de la rémunération, a été maintenu suite à l'adoption d'un régime officiel de négociation collective afin de permettre la discussion de questions dépassant le cadre des négociations ainsi que des questions intéressant l'ensemble de la fonction publique et qui pourraient tomber sous le coup de la négociation en vertu de la Loi, mais qui dépassent le cadre d'une convention collective particulière. On a récemment mis au point une formule selon laquelle les accords conclus au CNM sur des questions qui pourraient figurer dans une convention collective lieraient les parties. La majorité des conventions collectives renferment maintenant une « disposition CNM » qui confère à tous les éléments négociables convenus au CNM la force de la convention collective. D'autres lieux de consultation prévoient, par exemple, un certain apport des employés aux décisions relatives au régime de pension et aux questions relevant de la compétence de la Commission de la fonction publique.

La résolution des différends : un choix de procédures

La LRTFP a innové à plusieurs égards, mais l'innovation la plus originale a été l'incorporation d'un choix de procédures permettant de sortir des impasses en matière de négociation, y compris une disposition pour le maintien des services essentiels dans le cas d'une grève légale. La Loi oblige l'agent négociateur à décider de la méthode ultime de règlement d'un différend avant de donner avis de négocier. On offre deux choix : soumettre le différend à un bureau de conciliation, tout en conservant le droit de grève, ou se soumettre à l'arbitrage exécutoire. Quel que soit le choix, on peut nommer un conciliateur pour aider les parties à se mettre d'accord avant de passer à l'étape ultime du processus. L'agent négociateur est lié par son choix de méthode de règlement du différend pour la ronde de négociations pour laquelle cette méthode a été prévue. Il peut toutefois modifier son choix avant le début des négociations en vue d'une autre convention collective. L'agent négociateur a le droit exclusif du choix de la méthode. L'employeur ne peut opposer de veto à la méthode choisie.

L'option de grève est sujette à la condition ou à la sauvegarde que les employés des services essentiels, décrits dans la Loi comme des « employés désignés », n'ont pas le droit de grève. Vingt jours après que l'une ou l'autre des parties a donné l'avis de négocier, l'employeur doit fournir à la CRTFP et à l'agent négociateur une liste des employés ou des catégories d'employés que l'employeur considère comme « employés désignés ». L'agent négociateur a le privilège de s'opposer à cette liste. On ne peut entamer des procédures de conciliation tant que l'on ne s'est pas entendu sur la liste d'« employés désignés ». La Loi stipule que, si les parties n'arrivent pas à s'entendre, la CRTFP décidera des employés à désigner.

Il est évident que le choix de procédure est déterminé, dans une certaine mesure du moins, par les pressions que l'agent négociateur juge qu'il peut exercer en cas de grève. Ce choix est à son tour conditionné par le nombre d'employés qui risquent d'être désignés. Par conséquent, afin d'aider l'agent négociateur à décider quelle option de règlement d'un différend choisir, surtout lorsqu'il s'agit d'un agent négociateur nouvellement accrédité, la LRTFP accorde le droit à l'agent négociateur de demander, avant de déposer son choix de méthode de règlement d'un différend auprès de la CRTFP, que l'employeur fournisse à la Commission et à l'agent négociateur ce que l'on pourrait appeler une liste préliminaire des employés ou des catégories d'employés que l'employeur propose *alors* de désigner. Cette liste ne peut être contestée devant la Commission. Rien ne garantit non plus que la liste ne sera pas révisée, peut-être même en profondeur, par l'employeur avant que les négociations n'en viennent à une impasse.

La LRTFP impose des restrictions aux questions qui peuvent faire l'objet d'un rapport d'un bureau de conciliation ou d'une décision arbitrale. Cela aussi influence le choix d'une procédure de résolution des différends par l'agent négociateur : les restrictions sont plus sévères et appliquées plus sévèrement dans les procédures d'arbitrage que dans les procédures de conciliation. Les limites générales au champ d'application des négociations valent également pour le rapport d'un bureau de conciliation et pour une décision arbitrale. La Loi mentionne en outre, peut-être dans le but de garantir une plus grande certitude, certaines questions qui ne peuvent faire l'objet ni d'un rapport d'un bureau de conciliation ni d'une décision arbitrale. Il s'agit des normes, des procédures ou des méthodes régissant les nominations, de l'appréciation, de l'avancement, de la rétrogradation, de la mutation, de la mise en disponibilité ou du renvoi des employés. Lorsqu'un différend doit être réglé par arbitrage, la Loi déclare de plus que la décision arbitrale ne peut porter que sur les taux de traitement, les heures de travail, les droits à des congés, les normes disciplinaires et les autres conditions d'emploi qui s'y rattachent directement. Les questions qui n'ont pas fait l'objet des négociations préalables ne peuvent non plus faire l'objet d'une décision arbitrale. Cette restriction ne vaut pas dans le cas du rapport d'un bureau de conciliation.

Jusqu'en 1975, c'est le Tribunal d'arbitrage de la fonction publique qui était chargé de l'arbitrage des conflits d'intérêts; en 1975, des modifications à la LRTFP ont transféré à la CRTFP les fonctions d'arbitrage ainsi que l'arbitrage des griefs, dont il sera question ci-dessous. Les bureaux de conciliation, par contre, sont nommés au besoin tout comme dans le cas des lois sur le secteur privé. Le président de la CRTFP est responsable de la nomination d'un bureau de conciliation et de la préparation de son mandat.

Dans l'élaboration du mandat d'un bureau de conciliation, il est arrivé parfois que le président de la CRTFP incorpore des propositions qui dépassent le cadre des négociations permises en vertu de la LRTFP. En d'autres mots, il arrive que le mandat accordé à un bureau de conciliation ouvre la porte à des discussions entre les parties relativement à certaines questions non négociables afin de voir si l'on peut y apporter une solution. De telles références sont toujours sujettes à la mise en garde voulant que le rapport d'un bureau de conciliation doive tenir compte des limites imposées par la Loi, mise en garde que l'on n'a pas toujours respectée. En outre, en l'absence d'un mécanisme expéditif visant à assurer que les recommandations du bureau de conciliation soient conformes à son mandat, l'employeur a, à l'occasion, été incité à faire des concessions relativement à des questions non négociables au cours du processus de conciliation, surtout lorsque l'agent négociateur est particulièrement puissant. Cela est arrivé, par exemple, dans le cas de la question des changements technologiques lors du processus de conciliation avec le Syndicat des postiers. Si la Commission devait accorder des concessions semblables dans le cas d'une décision d'arbitrage, les tribunaux les renverseraient probablement en déclarant que la Commission avait outrepassé sa juridiction. Par conséquent, même si quelques agents négociateurs qui ont choisi l'arbitrage ont réussi, *grâce à la négociation*, à faire inclure dans leurs conventions certaines conditions qui échappent à la portée de l'arbitrage, le processus d'arbitrage impose des limites plus sévères que la conciliation, tant en droit qu'en pratique.

Les griefs

Tout comme la plupart des lois régissant les relations de travail au Canada, la LRTFP préconise des dispositions relatives au règlement des griefs qui surviennent au cours d'une convention collective et interdit les grèves pendant qu'une convention collective est en vigueur. Bien qu'il n'existe presque aucune restriction sur les questions qui peuvent faire l'objet d'un grief, les seuls griefs qui peuvent être renvoyés à l'arbitrage sont ceux qui relèvent d'une convention collective ou d'une décision arbitrale ou qui visent certains types de mesures disciplinaires. Le renvoi autre que pour des raisons disciplinaires — pour incompétence ou incapacité, par exemple — relève des dispositions de la Loi sur l'emploi dans la fonction publique et n'est donc pas sujet aux dispositions relatives à l'arbitrage de la LRTFP. Cette distinction a des implications pour la sécurité d'emploi puisqu'il est évident que c'est l'employeur qui détermine la raison du renvoi. Tout de même, il est arrivé, à l'occasion, que la CRTFP ait accepté une demande d'arbitrage lorsque, après examen des faits, elle eut conclu que le renvoi, bien que déclaré pour une autre raison, constituait en fait un renvoi disciplinaire. Les décisions de la Commission en cette matière et en d'autres dont la Loi la rend responsable sont discutées en détail dans le texte.

La LRTFP : la Loi et la pratique

Cette étude constitue un examen détaillé de la LRTFP. Nous avons cherché à établir comment les parties se sont adaptées à la Loi et à définir les problèmes qu'elles ont connus ce faisant. Nous nous sommes penchés sur les facteurs qui affectent le pouvoir de négociation des parties et nous avons analysé le résultat des négociations. Nous avons comparé l'évolution des salaires en vertu du régime de négociation de la fonction publique avec l'évolution dans les autres secteurs et nous avons établi des comparaisons semblables des articles des conventions collectives. De plus, nous avons identifié des questions de rémunération qui sont particulières à la fonction publique et d'autres qui apparaissent à l'horizon. Nous avons étudié la manière dont les autorités chargées de l'administration de la Loi ont interprété la Loi et, ce faisant, l'ont animée. Nous avons relevé des cas de révision judiciaire de décisions de la CRTFP et leurs implications. Nous avons examiné les facteurs motivant le choix des procédures de règlement des différends et les résultats concrets de ces procédures. Nous avons traité des cas de grief, des questions sujettes à l'arbitrage et de plusieurs décisions importantes relatives à ce processus. Nous avons aussi étudié la manière dont la Commission et, à l'occasion, les tribunaux ont abordé les infractions à la Loi. Dans le cas des questions aux dimensions politiques, nous avons traité des recommandations des diverses enquêtes publiques qui ont abordé, dans leur ensemble ou en partie, les relations de travail dans la fonction publique fédérale.

Les conclusions et les recommandations

Lorsqu'on évalue l'expérience de la LRTFP, il faut absolument se rappeler que les deux parties ont dû s'adapter à un régime qui leur était complètement nouveau au moment de l'entrée en vigueur de la Loi. À quelques rares exceptions près, elles ont abordé le régime de négociation collective sans aucune expérience de la négociation. Les deux parties ont dû former un groupe de négociateurs « à partir de rien ». Au cours de la période qui a suivi l'entrée en vigueur de la Loi, les négociateurs des deux parties étaient des hauts fonctionnaires qui se connaissaient bien; plusieurs d'entre eux avaient participé à la création du régime et avaient intérêt à le voir fonctionner avec succès. Avant longtemps, cependant, l'employeur s'est mis à recruter plusieurs de ses négociateurs dans le secteur privé; il en a fait de même pour un grand nombre de cadres responsables de l'administration des conventions collectives à divers paliers au sein des ministères. La plupart d'entre eux ont fait preuve d'attitudes plus fermes envers les relations patronales ouvrières et, par conséquent, envers les négociations que ce qu'on avait pu remarquer au cours des premières rondes de négociations. Les négociations subséquentes n'ont pas répondu avec autant d'empressement aux attentes des employés, qui avaient été soulevées par les premiers règlements de « rattrapage ». Si nous ajoutons aux difficultés fort considérables qu'ont connues les parties dans leur adaptation à une relation tout à fait nouvelle le fait que la plupart des négociations depuis le début des années 1970 se sont déroulées dans un climat économique difficile — un climat comprenant des restrictions salariales, des contrôles de salaire et, plus récemment, une récession économique — il est probablement remarquable que le régime ait fonctionné aussi bien.

Les réalisations et les préoccupations

La négociation collective a effectivement procuré aux employés fédéraux de nombreux avantages, dont la plupart sont consignés dans les conventions collectives; d'autres ont été obtenus au CNM. Les progrès ont été accomplis, par surcroît, sans que l'administration s'en trouve paralysée ou que les coffrets du fédéral se vident. Parmi les quelques interruptions de service que nous avons connues, une bonne part ont eu lieu aux Postes où, il faut s'en rappeler, les grèves n'étaient pas inconnues même avant que la Loi les autorise. Quant aux salaires, peu de conventions collectives négociées ont accordé les avantages par rapport au secteur privé que certains prédisaient et que d'autres croient toujours qu'elles procurent. Notre analyse de l'évolution des salaires indique que la perception des règlements inflationnistes dans le secteur public provient surtout de l'expérience provinciale, particulièrement dans les services parapublics.

Le fait que le régime a bien fonctionné dans l'ensemble et que, par conséquent, on puisse le considérer comme fondamentalement sain ne signifie pas qu'il n'existe aucun problème. La Loi manifeste des lacunes évidentes et son application laisse à désirer. Le climat, à la veille de la loi sur les contrôles, laissait peu de place à la complaisance. Les répercussions de la LRSSP, peu importe les conditions économiques qui les justifient, soulèvent de nouvelles préoccupations.

La suspension, même temporaire, de la plupart des éléments du régime de négociation collective établis en vertu de la LRTFP, la mise en cause sans précédent de conventions collectives signées à la suite d'un processus de négociation et la perception des agents négociateurs voulant que l'employeur ait mis de coté l'équité en mettant au point les programmes en sa qualité de législateur pourraient avoir de sérieuses répercussions sur la relation permanente entre les parties. Nous invoquons les parties de faire l'impossible pour s'assurer que le régime de négociation collective survive aux difficultés actuelles. Nous demandons en particulier aux formulateurs de politiques de combler les lacunes de longue date de la LRTFP avant que le cours normal des négociations reprenne lorsque expirera la LRSSP.

Nous ne nous étonnons pas du tout qu'à la lumière de l'expérience il faille apporter certains changements à une loi qui, au moment de son adoption, constituait une telle innovation. Ce qui est surprenant, surtout, c'est qu'il n'y ait eu aucune modification substantielle à la LRTFP depuis son entrée en vigueur il y a seize ans, tandis que les lois qui s'appliquent au secteur privé, ainsi que celles qui régissent le secteur public dans quelques provinces ont été modifiées plus d'une fois au cours de la même période.

Certains problèmes qui ont été identifiés dans cette étude et dans d'autres intéressent avant tout les parties et les administrateurs de la Loi. D'autres, en particulier le règlement des différends, intéressent de toute évidence le public. Certains se prêtent mieux que d'autres à un règlement par amendement législatif. D'autres sont peut-être à toutes fins utiles inhérents au régime, mais pourraient être paliés par l'effort. Parmi ces derniers problèmes, mentionnons ceux qui ont trait à la nature politique de l'employeur gouvernemental, à la structure diffuse de l'autorité bureaucratique, à la taille et à la diversité de la fonction publique et aux différents intérêts du centre et des parties, c'est-à-dire le Conseil du Trésor et les ministères d'exploitation. Nous en avons traité en profondeur dans le texte. Nous avons aussi traité en détail des problèmes qu'a soulevés l'administration de la Loi et qui révèlent un besoin d'amendement ainsi que des nombreuses recommandations de changement prononcées par diverses enquêtes publiques, dont une a été dirigée par un des coauteurs de cette étude. Les problèmes qui appellent une attention urgente ainsi que des observations et recommandations générales peuvent être regroupés sous différents titres.

La structure des unités de négociation

La structure des unités de négociation envisagée dans la LRTFP et adoptée lors des accréditations originales était intéressante et innovatrice au moment de son adoption; elle a en outre favorisé l'évolution rapide du régime. En pratique, cependant, la multiplicité des unités de négociation commence à peser aux plus gros agents négociateurs ainsi qu'au Conseil du Trésor pour qui la négociation est maintenant un processus quasi permanent. Un consensus commence à se dessiner selon lequel il serait souhaitable de réduire le nombre d'unités de négociation. Une telle réduction permettrait d'éliminer, d'une part, le double emploi dans les négociations de clauses semblables ou identiques en vue de conventions collectives distinctes, comme c'est présentement le cas. D'autre part, elle permettrait de réduire la possibilité d'interruption séquentielle de services en cas de rupture des négociations.

En règle générale, on semble être d'avis qu'il faille favoriser, dans la mesure du possible, la négociation coordonnée ou concertée, particulièrement en ce qui a trait à des questions d'intérêt commun. Les négociations au CNM représentent un pas méritoire en ce sens. Mais il importe aussi d'amender la Loi. Nous jugeons essentiel d'éliminer toute entrave à la consolidation des unités de négociation qui existent dans la Loi actuelle. Cela ne signifie cependant pas que la consolidation des unités de négociation soit nécessairement souhaitable dans tous les cas. Les autorités responsables et les parties devraient bien peser les avantages et les désavantages de la consolidation. La Loi devrait permettre à la CRTFP de favoriser la consolidation des unités de négociation lorsqu'il est démontré qu'une telle consolidation servirait l'intérêt public.

Les exclusions des unités de négociation

La formulation actuelle des critères d'exclusion de certaines personnes des dispositions de négociation collective dans la Loi a provoqué de nombreuses disputes au sujet du libellé technique et semé la discorde entre les parties. Certaines des causes dont il a été question dans le texte en font foi. C'est ainsi que les agents négociateurs ont commencé à soupçonner que plusieurs employés se voient classifiés comme personnes préposées à la gestion ou à des fonctions confidentielles non pas en raison de leur travail, mais afin d'assurer un noyau de personnes exclues dans le but de maintenir le service en cas de grève. La façon dont l'employeur a traité les questions d'exclusion d'agents de griefs, par exemple, n'a fait que renforcer les soupçons. Les agents négociateurs, par contre, ont réussi à exercer des pressions excessives en vue de retarder des décisions en raison des délais incorporés dans la procédure. Les formulateurs de politiques doivent s'attaquer à la question des exclusions ainsi qu'à la manière d'en décider.

Le champ d'application des négociations

Notre analyse des dispositions des conventions révèle que les agents négociateurs dans la fonction publique fédérale ont réussi à négocier plusieurs avantages qui font la norme dans le secteur privé et qu'ils jouissent d'autres avantages, hors du cadre des conventions négociées, relativement à certaines autres questions. Ils ont aussi réussi à négocier des avantages qui vont bien au-delà de ce que l'on retrouve dans le secteur privé : les congés de maternité et d'autres avantages familiaux, les indemnités de cessation d'emploi, les congés d'études et divers privilèges professionnels, pour n'en mentionner que quelques-uns. Les dispositions relatives à la sécurité d'emploi brillent toutefois par leur absence en raison des limites statutaires au champ d'application des négociations.

Bien que l'on convienne en général que quelques éléments doivent échapper à la détermination bilatérale lorsqu'un gouvernement est employeur, nombre d'enquêtes publiques ont reconnu que les limites au champ d'application des négociations en vertu de la LRTFP ainsi que les limites connexes à l'accès à l'arbitrage, particulièrement dans les cas de renvoi, sont trop sévères. Il nous apparaît évident qu'il serait possible d'étendre le champ d'application des négociations en ce qui a trait à quelques questions actuellement restreintes, sans mettre en jeu le pouvoir de gouverner du gouvernement et sans miner le « principe du mérite ». D'autres limites doivent demeurer. Nous proposons de songer à soumettre à la négociation, sous une forme ou une autre, quelques aspects de l'autorité qui revient actuellement à la Commission de la fonction publique et au Conseil du Trésor; on pourrait songer, entre autres, aux critères de mise à pied, aux changements technologiques, aux normes de classification et à l'évaluation du rendement.

Les griefs et l'arbitrage

Si l'on devait accroître le champ d'application des négociations, tel que nous l'avons recommandé ci-dessus, les occasions de présenter des griefs et, plus particulièrement, de les voir soumis à l'arbitrage augmenteraient considérablement. Il est clair que le régime doit pouvoir traiter toutes les plaintes légitimes et que les employés doivent être conscients de cette possibilité si l'on espère améliorer le climat des relations de travail. La question de l'accès à l'arbitrage se pose de manière particulièrement aiguë dans les cas de licenciement. La Loi est actuellement formulée de manière que la raison du licenciement, telle qu'énoncée par l'employeur, décide dans certains cas du recours possible. Lorsqu'il s'agit d'une question d'une importance vitale pour l'employé, le régime actuel peut s'avérer déroutant, onéreux et injuste. Nous recommandons fortement d'amender les lois actuelles de façon que tous les cas de licenciement soient soumis au même processus, c'est-à-dire l'arbitrage par la CRTFP.

Le règlement des conflits d'intérêts

Depuis la transformation de la Société canadienne des postes en société de la couronne, certains conflits de travail ayant le potentiel de devenir des causes célèbres ne relèvent plus de la compétence de la fonction publique. Seul le temps révélera si le Code canadien du travail permettra de régler plus facilement les problèmes qui ont engendré ces conflits. Seul le temps aussi nous dira si le départ des Postes de la fonction publique fédérale réduira le nombre de problèmes dans ce secteur ou si d'autres problèmes viendront combler le vide. Pour le moment ou dans un avenir prévisible, on ne manque certes pas de problèmes. Parmi eux, la question du règlement des différends est au premier plan et le demeurera lorsque la LRSSP, qui a suspendu temporairement le droit de grève, cessera d'être en vigueur.

Au début, on a favorisé fortement l'arbitrage afin de sortir des impasses, comme les décideurs l'avaient prévu et souhaité. Le fait qu'un nombre important d'unités de négociation ait depuis modifié leur choix original, avec comme résultat que la majorité des employés de la fonction publique fédérale ont maintenant choisi la voie de la conciliation, indique que la confiance dans l'arbitrage n'a pas fait long feu. On a vu se manifester des signes d'une tendance soutenue, peut-être même dramatique, vers le militantisme chez des groupes desquels on ne s'attendait pas du tout à un tel comportement. Forts de l'encouragement de quelques nouveaux chefs, même les groupes les plus traditionnellement dociles semblaient décidés, lorsque le régime de négociation collective était toujours en vigueur, que le temps était venu de modifier ces tactiques. Cette situation pose de sérieux problèmes en matière de politique pour la période qui suivra les contrôles, problèmes que les décideurs devraient étudier sans tarder. Car, même si la LRSSP retardera les conséquences de cette évolution, il est fort possible que les relations entre les parties se caractériseront par un fort militantisme lorsque la période de restrictions prendra fin. On serait très mal avisé de remettre l'étude du règlement des différends aux calendes grecques.

Nous croyons que l'abandon graduel de l'arbitrage est regrettable. Nous incitons les décideurs à faire tout en leur possible pour arrêter, ou même renverser, cette tendance. Il faut chercher à rendre l'arbitrage plus acceptable aux agents négociateurs. Cette option doit non seulement être juste, mais être *jugée* comme juste par ces derniers. Tel n'est pas le cas actuellement. Afin de rendre l'arbitrage plus attirant pour les agents négociateurs, nous nous proposons d'accroître le champ d'application de l'arbitrage afin de le rendre conforme, dans la mesure du possible, à la portée des questions négociables.

Une grave question de principe se pose en matière de règlement des différends au sujet de la disposition de « désignation » qui, en contrepartie du droit de grève, représentait un des aspects les plus innovateurs de la LRTFP. Dès le début, les parties se sont opposées au sujet du nombre d'employés à désigner dans certaines circonstances ainsi qu'au sujet des tâches que les employés désignés pouvaient être obligés d'accomplir. L'expérience a aussi démontré qu'il existe des lacunes dans la disposition de désignation elle-même, en particulier en ce qui a trait à la définition plutôt restrictive des services à protéger ainsi qu'à la lenteur du processus de désignation. Ces lacunes appellent de toute évidence des amendements à la Loi. Toutefois, malgré les faiblesses de la Loi et les écarts dans son application, il semblait jusqu'à récemment que les deux parties avaient réussi à s'entendre sur un *modus vivendi*.

La CRTFP n'a jamais eu la tâche facile lorsqu'il s'agissait d'interpréter et d'appliquer la disposition relative à la désignation. Elle a déclaré d'emblée que, si elle devait faire fausse route, elle préférait le faire dans le sens de la prudence. En d'autres mots, en cas de doute, elle préfère désigner trop d'employés que trop peu. Effectivement, depuis quelques années, la CRTFP est allée au-delà de l'interprétation littérale du texte de la Loi en décrétant que certains services sociaux, tels que les services des commis chargés du traitement des chèques de bien-être et des autres chèques du genre, s'inscrivent dans la catégorie « la sureté et la sécurité du public ».

La cause récente relative aux contrôleurs aériens est la première où la politique que les parties eux-mêmes ont observée pendant plus de dix ans et sur laquelle la CRTFP a fondé ses décisions en matière de désignation a été mise sérieusement en question par l'employeur. Le cas « ACCTA », comme on l'appelle souvent, semble témoigner d'un changement significatif dans la philosophie de l'employeur en matière de droit de grève dans certains services. Il serait peut-être utile de donner ici quelques précisions historiques afin d'illustrer ce point.

Dans le premier cas de désignation à être présenté à la CRTFP — une cause de contrôle du trafic aérien en 1968 — l'employeur avait limité ses propositions de désignation aux contrôleurs aériens travaillant dans ce que l'on pourrait décrire généralement comme des « situations d'urgence ou de risque ». De plus, l'employeur lui-même, *dans ses propres propositions*, suspendait tous les services de contrôle du trafic aérien dont dépendaient surtout les transporteurs commerciaux. L'employeur a adopté la même attitude dans chaque ronde de négociations pour les employés de l'unité du contrôle du trafic aérien jusqu'en 1980, lorsque, à la veille des négociations avec l'unité du contrôle du trafic aérien, le ministère des Transports annonçait que tous les aéroports et les stations aériennes du gouvernement devaient « demeurer en service à tout moment raisonnable »; en d'autres mots, même dans le cas d'une grève par les employés de l'unité du contrôle du trafic aérien. À la lumière de cette décision, l'employeur proposait que, dans le cas d'une grève par les employés de cette unité, tous les contrôleurs en service devaient s'acquitter de leur travail ordinaire. Comme la politique du gouvernement voulait que tout le trafic commercial continue à fonctionner, tous les contrôleurs du trafic aérien de la catégorie d'exploitation étaient devenus essentiels à la « sûreté ou à la sécurité du public », ce qui constituait le critère de désignation en vertu de la LRTFP. L'agent négociateur a contesté la liste de plus de 1 700 désignations présentée par l'employeur, ce qui se comparait à environ 200 au cours des rondes précédentes. La Commission a décidé à l'unanimité dans une décision provisoire qu'elle n'était pas tenue de tenir compte des énoncés ministériels ou gouvernementaux sur le niveau des services à maintenir. Elle a plutôt décidé que sa responsabilité de déterminer le nombre ou les classes de contrôleurs aériens à être désignés l'obligeait à décider du niveau des services à être assurés par les contrôleurs aériens aux aéroports fédéraux en vue d'assurer la sûreté et la sécurité du public dans le cas d'une grève légale par les membres de l'unité. La Cour d'appel fédérale a renversé la décision de la Commission après avoir conclu, en partie, que la Commission n'avait aucun droit, en vertu de la Loi, de déterminer le niveau des services, puisque cette question constituait une décision de principe qui incombait uniquement au gouvernement. La Cour suprême du Canada a confirmé le jugement de la Cour d'appel fédérale.

Nous sommes d'avis que le gouvernement s'est servi de la disposition relative à la désignation dans le cas ACCTA pour mettre en œuvre un changement dans la politique relative au droit de grève des contrôleurs aériens, plutôt que de présenter un amendement à la Loi, afin d'éviter le débat de principe qui serait survenu au Parlement. Le cas ACCTA est venu compliquer encore davantage le travail de la CRTFP dans son interprétation et son application de la disposition relative à la désignation. Il est maintenant impossible de s'orienter à partir des accords antérieurs entre les parties et des décisions antérieures de la Commission. On peut prévoir que les décisions des tribunaux auront des répercussions sur les désignations dans plusieurs autres unités de négociation : par exemple, dans l'électronique, la radiotélégraphie, les pompiers, la météorologie, les commis aux écritures et aux règlements et le traitement mécanique des données. Cependant, même si les décisions des tribunaux ont réécrit les règles du jeu en matière de désignation en vertu de la LRTFP, elles n'ont probablement pas réglé la question de la désignation une fois pour toutes. Nous insistons pour que la Loi soit précisée aussitôt que possible en ce qui a trait au respect du principe de désignation et à ses implications pour le droit de grève puisque les tribunaux ont jugé, à vrai dire, que le droit de grève en vertu de la LRTFP, tel qu'il est actuellement formulé, n'est pas nécessairement un droit en pratique. Encore une fois, si la politique que le gouvernement semble avoir adoptée a gain de cause, il est des plus importants qu'un agent négociateur puisse choisir d'avoir recours à l'arbitrage plutôt qu'à un bureau de conciliation à tout moment du processus. Autrement, si l'on désigne un grand nombre d'employés et si l'on enlève à l'agent négociateur la possibilité de maintenir une grève légale efficace, ce dernier se verrait privé par la Loi de tout moyen efficace de sortir d'une impasse par la négociation.

En dernier lieu, en ce qui a trait au règlement des différends, il est devenu évident à la lumière de l'expérience que l'employeur public devrait avoir le droit de lock-out en contrepartie du droit de grève des employés. Ce problème a surgi pour la première fois dans la fonction publique fédérale lors des grèves rotatives aux Postes. Le service postal a été à toutes fins utiles paralysé, et ce à un coût minimum pour le syndicat. D'autres agents négociateurs semblent maintenant suggérer des tactiques semblables. Les agents négociateurs doivent être obligés de faire un choix décisif.

Les pratiques déloyales

Les délais et les inconstances dans le traitement de la non-observation de la Loi ne peuvent être que contre-productifs. Nous sommes donc d'avis que toutes les infractions à la Loi devraient être entendues par la CRTFP. Les délais encourus dans l'obtention du droit d'intenter des poursuites, tels que l'exige la Loi actuelle, et le traitement inconstant de ces causes par les juges provinciaux, à qui cette procédure répugne, constituent des raisons suffisantes pour confier la compétence exclusive à la Commission. Les amendes nominales imposées par les tribunaux suite à des procédures interminables n'ont pas servi de préventifs dans de tels cas. Nous ne suggérons pas d'imposer des amendes minimales. Il faut tenir compte dans chaque cas des circonstances. Nous sommes convaincus que la Commission est la mieux placée pour comprendre les enjeux et juger des circonstances de chaque cas.

L'hésitation de l'employeur dans le passé, et à vrai dire jusqu'à assez récemment, à chercher à faire observer les dispositions de la LRTFP relatives aux grèves illégales, et particulièrement à celles auxquelles participent les employés désignés, a encouragé quelques employés à défier la loi. Les employés désignés ou leurs collègues dans la même unité doivent se souvenir que c'est ce principe même de désignation qui leur a permis d'obtenir le droit de grève. Il est arrivé que, lorsque l'employeur a cherché à obtenir le droit d'intenter des poursuites ou d'imposer des mesures disciplinaires dans le cas d'une grève, il est survenu un long délai entre la perpétration de la prétendue infraction et le début des procédures ou des poursuites. De tels délais ne peuvent qu'entraîner de l'amertume lorsque l'infraction semble avoir été « pardonnée ».

Le besoin d'uniformité dans les pratiques de gestion

Certains problèmes soulevés au cours de cette étude, qui ne peuvent se prêter à des solutions par des modifications de la Loi, exigent néanmoins que les décideurs s'y arrêtent sérieusement. Le manque d'uniformité dans les politiques et dans la pratique, en particulier, peut miner la crédibilité du régime et porter atteinte à la relation entre les parties. Ces inconstances doivent être corrigées de toute urgence. Il n'est pas difficile d'en trouver des exemples à l'étape de la négociation. La perception des agents négociateurs voulant que l'on accorde un traitement particulier à différents groupes, dépendant des pressions qu'ils peuvent exercer, n'est pas propice à un sain climat de négociation. Le besoin d'uniformité et d'une grande perception d'uniformité par les premiers intéressés ne peut être trop souligné. Cela vaut aussi pour l'administration de la convention collective.

Il est évident que les dispositions d'une convention collective ne sont pas interprétées d'une manière uniforme parmi tous les secteurs de la fonction publique. Les difficultés d'application d'une convention collective négociée au centre et visant des lieux éloignés et des ministères fort divers exigent une coordination beaucoup plus grande de la politique que celle que l'on connaît actuellement. Nous recommandons que dès la signature d'une convention collective, l'employeur mette en œuvre un programme d'information beaucoup plus complet que celui qui existe actuellement. Les gestionnaires responsables des relations de travail devraient être mis au courant du sens de la convention collective; ils devraient, en fait, être réunis pour discuter de sa signification, particulièrement en ce qui a trait aux mesures disciplinaires. Le manque d'uniformité dans les normes de discipline et dans l'application de cette discipline ne peut qu'être contre-productif; tel est aussi le cas de l'application rigide des procédures disciplinaires, souvent inspirées des directives du Conseil du Trésor, sans égard aux circonstances. On devrait tenter d'éviter ces deux situations. Pour qu'une relation satisfaisante s'installe, les gestionnaires doivent pouvoir allier constance et souplesse. Un programme d'instructions permanent devrait avoir comme objectif la formation de gestionnaires des relations de travail disposant de connaissances suffisantes des lignes directrices gouvernementales pour pouvoir les appliquer uniformément et d'une connaissance suffisante des relations humaines pour faire preuve de souplesse lorsque les circonstances l'exigent.

1: *Introduction*

Among the leading developments in Canadian industrial relations since the mid-1960s have been the extension of collective bargaining rights, frequently including the right to strike, to employees of senior levels of government, and the rapid expansion of bargaining in this sector as well as in the parapublic sector, such as hospitals and schools. In addition to bringing large numbers of new workers under a bilateral regime of labour relations, developments in the public sector have caused some interesting changes in the composition of the organized labour movement and brought new influences to bear on the formulation of policy in the councils of the Canadian Labour Congress (CLC). Most significant, of course, has been the impact of bargaining on the general public, with corresponding implications for public policy. Results of labour negotiations in the public sector may frequently have an even greater impact on the general public than on the parties to a particular bargaining relationship. This comes about when an impasse in negotiations causes an interruption of services, particularly when these are monopoly services, often essential to public welfare as well as to public convenience. The dollar cost of remuneration in the public service, largely borne by the taxpayer, also strikes an emotional chord in the public mind. This, in turn, raises important policy questions, as does the potential pattern-setting effect on the private sector of highly visible settlements in the public sector.

Public Employment and Compensation[1]

In 1981 the public sector, broadly defined, included more than 2.5 million employees, representing approximately 21.6 per cent of the whole employed labour force (Table 1). The sum total of wages and salaries in the public sector in the same year was over 55 billion dollars, amounting to about 35 per cent of the wages and salaries of the total work force in the private and public sectors combined (Table 2).[2]

There is no question but that the public sector comprises an important segment of the economy. The federal government is by far the largest single employer in the country. However, while a recently published study, conducted under the auspices of The Institute for Research on Public Policy, confirmed the popular perception of expanding government activities and rising government expenditures (relative to gross national expenditure), it found that the widely held view of uncontrolled growth in public employment, relative to the rest of the economy, was a myth. In spite of considerable increases in absolute numbers of public employees, particularly at the provincial level, and even some relative increases in government employment, the data showed little change when public sector employment as a whole was taken as a percentage of total employment between 1960 and 1975. The major growth spurt, relatively speaking, occurred in the 1940s and 1950s.[3] Table 1, based on Statistics Canada figures for more recent years, shows that the public share of total employment has remained remarkably stable and may even be on the decline. Table 2 shows that the overall public share of wages and salaries has increased in recent years, though probably not (relative to the rest of the economy) at the rate that is popularly believed. As we shall point out in a later chapter, the increase in the public share of wages and salaries reflects developments at the provincial and municipal levels and in the parapublic services. Negotiated increases at the federal level have, on the whole, amounted to less than those at the provincial and municipal levels and less than those in the private sector, as well.[4]

Unionization and Collective Bargaining Coverage

In contrast to these developments in employment and compensation, unionization and collective bargaining coverage in the public sector have continued to show important growth over the past decade or so in relative, as well as in absolute, terms. Table 3 shows that since 1967 there has been a steady and significant increase in public sector agreements as a percentage of major collective agreements, that is, those governing bargaining units of 500 employees or more. It shows, too, that there has also been a corresponding increase in the number of employees covered by collective agreements in the public sector as a percentage of total employees covered by major collective agreements. Although collective bargaining is more recent in many areas of public employment, and particularly at the senior levels of government, than in the private sector, it is at the senior levels that its coverage is now most complete and that the rate of unionization is highest. In the federal jurisdiction, employee organizations are now bargaining on behalf of well over 95 per cent of eligible public servants. The same is probably true of most of the provinces and territories. Moreover, in contrast to the private sector, where union membership in a bargaining unit may often be significantly lower than the number of employees covered by the collective agreement, the vast majority of employees eligible to bargain collectively at the senior levels of government are members of employee organizations[5] most of which are affiliated with the mainstream labour movement through the CLC. There are no figures readily available that record the number of organized employees of municipalities and of the parapublic services, but it may safely be said that the total of such employees in these areas, too, would far exceed that in the private sector.[6]

Impact on the Organized Labour Movement

The growth of union membership in Canada from 30.7 per cent of non-agricultural paid workers in 1966 to 37.4 per cent at the beginning of 1981,[7] a period in which the rate of unionization in the United States actually declined, may be attributed, in very large measure, to the adoption of collective bargaining by government employees at the federal and provincial levels, as well as to the considerable increase in collective bargaining in the health and education sectors, particularly by nurses and teachers. These developments have resulted in significant changes in the composition of the labour movement. For one thing, they have brought into the ranks of organized labour large numbers of white-collar and professional workers, groups that have been traditionally resistant to unionization in the private sector. They have also been a major factor in reducing the numerical dominance of U.S.-based unions, long a feature of the Canadian labour movement; the vast majority of workers in these burgeoning areas of collective bargaining are organized in exclusively Canadian unions. Membership in international unions, that is, unions whose headquarters are in the United States, dropped from 70.2 per cent of total membership in Canada in 1966 to 44.7 per cent by 1981.[8]

A few figures will illustrate the numerical importance of public service-employee organizations in the CLC and their growing influence in the councils of the Congress. At the beginning of 1981, in excess of 29.5 per cent of the CLC's 2 369 351 members were in unions representing public employees,[9] and three of its largest affiliates were public service unions. Two of these, the Canadian Union of Public Employees (CUPE) and the Public Service Alliance of Canada (PSAC), have been at or near the top of the list of the largest unions in the Congress since their formation, by a merger of existing organizations, in 1963 and 1966 respectively.[10] In 1965 CUPE displaced the United Steelworkers as the largest union in the CLC, a rank it continues to hold. The National Union of Provincial Government Employees (NUPGE), formed in 1976 by a merger of organizations of provincial public service employees and now enjoying representation from all provinces but Quebec and New Brunswick, has recently taken second place. The PSAC, for several years the third-largest affiliate of the CLC, immediately behind the Steelworkers, is now in fourth place.[11] The growing influence of public service unions in the affairs of the CLC is also demonstrated by the proportion of delegates from public service unions at the biennial conventions of the Congress. In 1976 these delegates represented about 29 per cent of the total number, in 1978 about 33 per cent, in 1980 over 41 per cent.[12]

The Right to Bargain Collectively

The membership of the unions mentioned above and of others representing public employees is drawn from different parts of the public sector, a term broadly defined and subject to a variety of statutory provisions relating to labour relations. CUPE, for example, represents non-professional hospital employees and workers in municipal employment, hydro-electric commissions, and so on, most of whom have long had bargaining rights under the general labour-relations legislation,[13] though in some instances with restrictions on the right to strike. Bargaining rights, with some modifications on the use of the strike, have also been available to teachers and nurses in most jurisdictions, sometimes under the general labour-relations legislation, occasionally under a separate statute. But apart from Saskatchewan, where a socialist government included its own employees, without qualification, in the coverage of its original labour legislation, the Trade Union Act of 1944, federal and provincial government employees had to wait until the 1960s and, in some cases, the 1970s for formal collective bargaining rights. At an earlier stage, before the 1960s or early in that decade, many jurisdictions had made provision for some form of consultation with the organizations representing their employees, but ultimate decision-making authority was retained by the government employer.

The Sovereignty Issue

The reluctance of senior levels of government to grant to their own employees rights that the law guaranteed to other workers, not only in the private sector, but in municipal employment, Crown corporations, and various parapublic services, was justified on the principle of the sovereignty of the state. Any system whereby a government and its employees might jointly determine terms and conditions of employment, as in collective bargaining (in contrast to a purely consultative system in which the government could make the final decisions), was held to be incompatible with this principle, as it still is in many quarters in the United States.[14] This view is reflected in a statement made by the Right Honourable Louis St. Laurent some years after the federal government had established the National Joint Council (NJC) as a forum for 'consultation' with its employees. In 1951, in reply to a question in the House of Commons, St. Laurent, then Prime Minister, said of the public service:[15]

> ...there is no process of collective bargaining in the sense in which that term is used in industry. From the very nature of employment in the public service, there can be no bargaining agent for the nation comparable with the employer in industry who has at his disposal funds derived from payment for goods and services. The funds from which the salaries are paid in the public service have to be voted by parliament and parliament alone can discharge that responsibility.

This reasoning also clearly precluded any form of compulsory arbitration to determine wages and conditions of employment in the public service as this, too, would derogate from the ultimate decision-making authority of the government and, by extension, from the sovereign authority of Parliament.[16]

However, in spite of the statement by the Canadian Prime Minister and similar views that were held at that time in the provinces, the growth of public service unions and pressures by the organized labour movement eventually forced governments in all jurisdictions to abandon the 'sovereignty' argument with respect to collective bargaining. The 'sovereignty wall', dented in Saskatchewan in 1944, crumbled in the rest of the country in the 1960s and 1970s. In some jurisdictions, the political climate even favoured including the right to strike when public service labour legislation was enacted.

The Evolution of Collective Bargaining Legislation

"Greater than the tread of mighty armies is an idea whose time has come," said Victor Hugo. In 1965, more than twenty years after the Saskatchewan initiative, but barely a year after its own premier, Jean Lesage, had stated categorically that "the Queen does not negotiate with her subjects," the Government of Quebec took a lead over other provinces and the federal government by granting broad collective bargaining rights, including the right to strike, to employees in the civil service.[17] The federal government followed suit in 1967,[18] New Brunswick in 1968,[19] and British Columbia in 1973.[20] Public service-bargaining legislation first enacted in Newfoundland in 1970 ostensibly included the right to strike, but, until it was amended in 1973, it imposed greater constraints on the exercise of this right than exist in the other jurisdictions.[21] The remaining provinces have granted their employees bargaining rights, but with third-party arbitration of unresolved interest disputes as a substitute for the right to strike.[22]

Legislation governing labour relations for public employees at the senior levels of government in Canada now bears the hallmarks, by and large, of what has come to be considered a comprehensive collective bargaining system This system includes a declaration of the right or freedom of employees to join an organization of their choice, a listing of practices that employers and their representatives are forbidden to engage in because they interfere with freedom of organization, remedies for infringement of this freedom, certification of bargaining agents, the spelling out of the process of bargaining and of processes for the resolution of interest disputes, the establishment of a procedure for the resolution of rights disputes, and so on. But although many of the basic principles of the general labour legislation have been incorporated into the statutes governing the public sector, it seems to have been widely accepted that the two types of legislation should not necessarily follow the identical pattern. It was pointed out nearly two decades ago that:[23]

> The problems of civil service staff relations are particularly complex in a society which accepts the relatively free development of trade unionism in private industry. Whereas the authoritarian state is as unconcerned about the rights of its civil servants as it is about those of any other group of its subjects, a constitutional state must seek to reconcile its own role as an employer with the norms of employer-employee relations prevailing in its realm. To reconcile does not, however, mean to adopt without modification the machinery of private labour relations. Few would deny that the unique legal character of the state and the over-riding importance of its functions must affect the form and spirit of its staff relations.

Certain fundamental differences between the private and public employer, notably the public employer's overriding responsibility to protect the public interest, have indeed been taken into account in the public sector-bargaining legislation. With the exception of Saskatchewan which, as already noted, included government employees, without qualification, under its general labour legislation, senior levels of government have made particular provisions for their own employees, most often in separate statutes granting them bargaining rights. Some jurisdictions also make special provisions for other categories of public employees, such as workers in the health and education sectors or in the protective services. An examination of the legislation shows, however, that wide policy differences still exist among jurisdictions regarding the most appropriate mechanism, at each stage of the process, by which to accommodate to the particular characteristics and responsibilities of public service employment the rights that are available to workers in the private sector. As there is now a considerable body of experience under a wide range of policy options in Canada, the time seems ripe to examine them in detail to see how they have been working in practice.

For several reasons we considered it appropriate to begin with the federal jurisdiction and to devote these two volumes to this sector. Our reasons include the innovative provisions of the Public Service Staff Relations Act and the large number of employees the Act covers in all areas of the country and even beyond, in the foreign service; the extent and variety of experience in the several rounds of bargaining since the Act was enacted; the considerable influence this federal statute has had on other legislation that followed.[24] A second work, for which research is already under way, will contain a detailed examination and comparative analysis of public sector labour relations in the provinces.

The Federal Experience

Background to Bargaining Rights

Canada's centennial year, 1967, marked a watershed in employer-employee relations in the federal public service. The enactment in that year of the Public Service Staff Relations Act (PSSRA) ended the practice of unilateral decision making by the government employer and established the regime of bilateral labour relations, some aspects of which have been suspended for a period of two to three years by the Public Sector Compensation Restraint Act (PSCRA) passed in the summer of 1982 as part of the government's program to control inflation. It is the regime of bilateral labour relations initiated by the enactment of the PSSRA with which this study is concerned. As other authors have dealt in detail with the events leading up to the enactment of this statute, we propose to do no more here than summarize the major historical highlights.

The federal Wartime Labour Relations Regulations of 1944 had specifically excluded from their operation "His Majesty or any person or corporation acting for or on behalf or as an agent of His Majesty," although certain bodies incorporated to act as agents of His Majesty were included.[25] The Industrial Relations and Disputes Investigation Act (IRDIA), enacted in 1948, continued to exclude government employees, although, like the wartime regulations it replaced, it included employees of Crown corporations and of many government agencies.[26] However, while government employees were excluded from the wartime regulations and the labour legislation that followed, their needs were not entirely ignored in this period.

The year 1944 marked the first formal acknowledgement by the government of the need for an institutionalized system of consultation for which the staff associations had been making sporadic demands over a period of time, and to which the employer had given occasional lip service.[27] Until 1944 virtually the only regular input that civil service organizations had in the determination of their terms and conditions of employment was by way of what has been called a 'humble petition', albeit often expressed in vigorous language. On 24 February of that year, the Minister of Finance, the Honourable J.L. Ilsley, announced that a National Joint Council to be made up of representatives of staff associations and senior officials representing the government as employer would be established to:[28]

> ...act in an advisory capacity to the treasury board in all matters affecting the conditions of work in the public service. In certain fields their recommendations may appropriately be made directly to the Civil Service Commission. The Council will, of course, not have any executive powers which would impair the responsibility of the cabinet or treasury board or Civil Service Commission, or possibly infringe upon the authority of parliament. While the council's functions will therefore be advisory only, it is clear that if both sides take their responsibilities seriously and endeavour to make the new organization a means of promoting better understanding, improved morale and greater efficiency in the civil service, any recommendations of the council reached by agreement should carry great weight with the treasury board and the Civil Service Commission.

Although the Council was not vested with authority to deal directly with rates of pay, nor was any means provided for the resolution of disagreements between the staff and official sides of the Council, its establishment was greeted in many quarters of the public service as "a real milestone".[29] In addition to reflecting some acceptance, however limited, of the right of public employees to influence the terms and conditions of their employment, other than by 'humble petition', it gave implicit recognition to the staff associations by granting them representation on the Council.[30] However, authority for the check-off of membership dues, which would provide the staff associations with a more reliable financial base, was not given until some years later.[31]

In spite of the initial enthusiasm that greeted the establishment of the NJC, some complaints were being voiced as early as 1947 that the Council had sunk into a state of "torpid somnolence",[32] although other opinion still held that the Council was "having 'some bearing on the shape of things to come' in the post-war civil service."[33] By the early 1950s, however, it was clear that the staff associations were becoming increasingly frustrated by the ineffectiveness of the Council and, in particular, by the exclusion of salary questions from its deliberations. Demands began to be voiced for collective bargaining as an alternative. One observer of the Council's activities during this period summed up the situation as follows:[34]

> The adamant stand which the Official Side had taken against meaningful consultations within the Council on the primary question of pay was itself sufficient to condemn the organization to ultimate inadequacy. The absence of any final and binding system for the resolution of disputes between the two sides, such as independent arbitration, . . . was a key factor in the development of employee demands for alternative channels. The failure of the Council to develop an operational and administrative framework capable of responding more efficiently and, above all, more rapidly to the needs of the times was also at the root of a good deal of employee dissatisfaction.

The Civil Service Act of 1918 had given to the Civil Service Commission (CSC) responsibility to recommend, for the consideration of the government, rates of compensation for any new classes that might be established, as well as changes in the rates of compensation for existing classes.[35] There, then, began the practice by civil servants' associations of making regular representations to the CSC about compensation, as well as the practice of making other representations directly to the government, of lobbying individual members of Parliament, and so on. The practice of making formal representations to the CSC about compensation continued after the establishment of the NJC because of the refusal of the government to deal with any question of remuneration in the Council. The associations became increasingly restless with this process; one of their major complaints was the inadequate sources of information on which they had to rely. By the 1950s they were pressing demands for access to the data available to the CSC, which would put them in a better position to challenge that body's recommendations.

In 1957 the government established the Pay Research Bureau (PRB) as an arm of the CSC. Its function was to provide objective information on salaries and working conditions, which would serve as a basis for the Commission's recommendations.[36] The PRB was to be advised and assisted in its work by an advisory committee including representatives of government departments and staff associations. However, the staff associations' expectation that their role in pay determination would be enhanced by this development was not realized. In fact, events in the two years following the creation of the PRB only served to exacerbate the frustration of the associations. In 1958 the CSC recommended to the government that no salary increase be granted. The Commission made this recommendation without consulting the associations on its interpretation of the data assembled by the PRB.[37] Nor were the associations consulted by the government that accepted the CSC's recommendation. In 1959 the Commission recommended a salary increase for the majority of classified civil servants. This time the recommendation was rejected by the government.[38] There is no need to elaborate on the staff associations' reaction.

A new Civil Service Act passed in 1961 appeared, on the surface at least, to allow the staff associations greater input into the process of pay determination.[39] It provided for consultation between the Minister of Finance or his designates and the representatives of organizations or associations of employees concerned with remuneration. Consultation was to take place either at the request of such representatives or on the initiative of the Minister. Similar consultation was to take place between the Minister or his designates, the CSC and the staff associations on terms and conditions of employment such as those relating to vacation leave, retirement leave, other types of leave of absence, the regulation of hours of work, and so on. Consultation was also to take place between the CSC and the staff associations on matters that lay within the Commission's jurisdiction. As to remuneration, recommendations were first to be made by the CSC, following consultation with the staff associations; after this the Governor in Council would establish rates and allowances.[40] This consultation system proved to be cumbersome and frustrating in practice. In fact "the representatives of the [staff] associations found that after their 'negotiations' with the CSC, they had to begin 'negotiations' all over again with the Treasury Board," the designated representative of the Minister of Finance.[41]

By the early 1960s the staff associations, as disenchanted with these new consultative procedures as they had been with those that preceded them, decided to insist on their right to a system of direct negotiations: in other words, collective bargaining.[42] They had the full backing of the CLC as well as the active support of New Democratic Party (NDP) members of Parliament. Moreover the time was ripe to exert pressure on the other political parties. In 1963, with a federal election in the offing, Claude Edwards, at the time president of one of the larger staff associations,[43] wrote to the major political parties asking them to declare their position on the issue of collective bargaining for federal public servants. The Conservatives, who were in power at the time, made a rather equivocal response, but the Liberals committed themselves without reservation to establish a system of 'negotiations and arbitration' if they were elected. When the Liberals were returned to office in a minority position, the unions, supported in Parliament by the NDP, lost no time in holding them to their promise.

In August 1963 the newly elected government appointed the Preparatory Committee on Collective Bargaining. This Committee, composed of senior government officials under the chairmanship of A.D.P. Heeney, was directed "to make preparations for the introduction into the Public Service of an appropriate form of collective bargaining and arbitration, and to examine the need for reforms in the systems of classification and pay applying to civil servants and prevailing rate employees."[44] The Committee reported in July 1965. In addition to making detailed recommendations for a formal system of collective bargaining, as required under its mandate, the Committee expressed the hope that:[45]

> ...at least within the confines of the "central administration", the parties to collective bargaining will find it both desirable and feasible to use an institution like the National Joint Council as a forum for systematic study and discussion of problems that transcend those of particular bargaining units. We believe that, if preserved and nurtured, the traditions associated with the Council could be put to good use in the new system and make a continuing contribution to the solution of Service-wide problems arising from the relationship between employer and employees.

The hope of the Preparatory Committee has indeed been realized in practice. A reconstituted National Joint Council has evolved, along with some other consultative mechanisms, as an interesting adjunct to formal negotiating procedures.[46]

Statutory Framework for Collective Bargaining

In 1967 three pieces of legislation were enacted on the basis of the Preparatory Committee's recommendations: the Public

Service Staff Relations Act,[47] the Public Service Employment Act,[48] and amendments to the Financial Administration Act.[49] Together they created the statutory framework that has governed employer-employee relations in the public service until 29 June 1982; this framework has been temporarily disrupted by the enactment of the PSCRA. As this study is concerned primarily with problems of staff relations, only the PSSRA and the PSCRA will be examined in detail. Consideration of the other Acts will be limited to the few sections they contain that have a direct bearing on staff relations.

The mandate of the Preparatory Committee and its subsequent *Report* were satisfactory to most of the staff associations, which, apart from the union representing the inside postal workers, had not been asking for the right to strike.[50] However, the situation changed before the government had time to implement the Committee's recommendations. Shortly after the Committee reported, the inside postal workers, dissatisfied with the increase they had just been awarded as a result of a cyclical salary review, went on strike; they were supported by the Letter Carriers' Union.[51] The postal unions subsequently announced that they would defy any collective bargaining legislation that denied them the right to strike. Their stand appears to have convinced the government that a statutory prohibition of the right to strike would only make strikes unlawful for groups, such as the postal workers, who were strong enough and determined enough to defy the law.[52] The government also saw little likelihood, at the time, that many public service unions would choose to resort to strikes if they were given the alternative of resolving bargaining impasses by arbitration. Whatever the reason, it is now a matter of history that the government went beyond the recommendations of the Preparatory Committee, as well as beyond the mandate it had given the Committee. It included a strike option, along with an arbitration option, as the processes for resolving bargaining impasses; a pre-bargaining choice of option was to be made by the bargaining agent. However, the strike option was made subject to the condition or safeguard that employees engaged in certain essential services, described in the legislation as 'designated employees', were forbidden to strike. These provisions were among the most innovative features of the PSSRA.

The administration of the Act was entrusted to a number of agencies whose independence from the government in its role of employer was made clear. A tripartite Public Service Staff

Relations Board (PSSRB) was established and vested with the sort of authority that under the general labour-relations legislation in Canada is normally vested in a labour-relations board. Until 1975 another tripartite agency, the Public Service Arbitration Tribunal, dealt with interest disputes, while arbitration or 'adjudication' of grievances, to use the technical language of the Act, fell within the jurisdiction of a corps of neutral adjudicators. In 1975 the Act was amended, and the functions of the Tribunal and the adjudicators were transferred to the Board itself. The third-party functions usually performed by the Minister of Labour under the general labour-relations legislation, such as the appointment of conciliators and conciliation boards, were entrusted from the outset to the Chairman of the PSSRB.

Before we turn to an examination of the PSSRA and the experience that followed, we should note that the 'sovereignty' doctrine was no longer an issue when the Preparatory Committee was appointed. Nowhere in the Committee's *Report* is sovereignty referred to as a particular problem. Moreover a careful examination of the official record of the debate in the House of Commons at the resolution stage and on first and second readings of the PSSRA in 1966 and 1967 reveals that:[53]

> While there is some passing reference to the need for the legislation ensuring the preservation of the government's public and national responsibilities, not a single member of any of the parties in the House indicated any great concern that the Bill constituted an infringement of sovereignty. The emphasis throughout the debate was not on the abstract theory of sovereignty but on the practical problems involved.

The government had taken care, in drafting the Bill, to protect its traditional prerogatives and the authority of Parliament with respect to public policy issues, as distinct from wages and other conditions of employment in the public service that would henceforth be the subject of collective bargaining. That the government did not intend to leave matters of public policy to be determined in a labour management relationship will be evident when we come to discuss the Act in detail, particularly its provisions covering the scope of bargaining and the techniques for resolving bargaining impasses. At this point it is sufficient to note that policy matters were not ignored when the legislation was under consideration by Parliament. On second reading of the Bill, the Honourable E.J. Benson, then President of the Privy Council, said:[54]

> ...it is not necessary for me to remind hon. members of the ultimate sovereignty of parliament and its authority to protect and safeguard the public interest. It is, I believe, our duty in dealing with issues of this kind to legislate in such a way as to deny no man the ordinary rights and privileges of Canadian citizens unless in the public interest it is absolutely necessary to do so. On the other hand, no one should doubt the capacity or willingness of parliament to qualify such rights and privileges where they are being used in gross disregard for the well-being of the community.

Indeed, the "rights and privileges" accorded to public servants under the PSSRA have been 'qualified' by Parliament on a number of occasions: by the Air Traffic Control Services Continuation Act in 1977, by the Postal Services Continuation Act in 1978, and by the Public Sector Compensation Restraint Act in 1982;[55] all of these will be discussed in later chapters. The first two statutes mentioned prohibited strikes in the services concerned. The last-mentioned Act, part of the program devised by the government to deal with Canada's serious economic problems, in effect puts 'on hold' for a time the era of collective bargaining in the federal public service that was introduced in 1967. A news release from the Treasury Board on 30 June 1982 described the purport of the legislation in these words:

> Under the public sector compensation restraint program, existing collective agreements or compensation plans would be extended for two years past the date of expiration or the date of the next scheduled economic increase, where one is provided. Beginning on that date, employees would come under a two-year program that provides a maximum wage increase of six per cent in the first year and five per cent in the second year. Except for wage rates, most existing terms and conditions will continue to apply without change for the two-year extension period.

Special provision is made in the Act for tentative agreements that were arrived at, but not implemented, before 29 June 1982 and for agreements that expired and were renewed before that date.

In the following chapters we shall consider how the philosophy enunciated by Mr. Benson has been implemented in practice, the problems that have been encountered in administering the legislation, and the suggestions that have been made to resolve them. When considering problems with policy implications, we shall refer, among other matters, to the findings and recommendations of various public inquiries that have dealt, in whole or in part, with the question of employer-employee relations since the PSSRA was enacted. A public inquiry into employer-employee relations under the Act was conducted by one of the co-authors of this study. This resulted in a three-volume report tabled in Parliament in 1974; the report was followed a year later by a volume of supplementary recommendations.[56] A parliamentary committee formed to consider these recommendations reported in 1976.[57] In addition two other public inquiries, the Lambert Commission[58] and the D'Avignon Committee,[59] addressed themselves to a number of problems in the employment relationship in the context of broader studies. Some recommendations arising from these inquiries now appear to be receiving serious consideration. However, the only legislative implementation of the recommendations has been an amendment to the PSSRA in 1975, absorbing the arbitration and adjudicative functions into the structure of the PSSRB.[60]

Notes

1. The presentation of accurate statistics on the size of the public sector is complicated by the different concepts of 'public sector' on which different data sources base their calculations, as well as by different methods of computation used by different data sources (for example, treatment of part-time employees). The figures on public employment and compensation in this chapter are based on Statistics Canada publications covering the federal, provincial and local levels of government. These take into account teachers and hospital employees and employees of government enterprises, as well as employees of government departments and departmental corporations.

   Figures on total employment, as on public service employment, differ according to the data source from which they are taken. To maintain consistency for purposes of comparison, the figures on total employment and compensation are also based on Statistics Canada data.

   Employment and compensation figures cited in this chapter are valid as of December of the specified calendar year, except that for 1981 they reflect the situation as of 1 September of that year.

2. The total cost of remuneration in the public sector is actually higher than indicated as these figures do not include 'supplementary labour income', which is defined by Statistics Canada as "payments made by the employer for future benefits of employees." These include payments to the Canada and Quebec Pension Plans, Workmen's Compensation, Unemployment Insur-

ance, and medical- and hospital-insurance plans. In 1979 supplementary labour income was estimated at 14.39, 16.23 and 14.44 per cent of wages and salaries of federal, provincial, and local government employees respectively. (Unpublished data from Statistics Canada. Similar data for the private sector are not available.)

3. For a comprehensive treatment of developments in public employment and compensation, including disaggregated statistics on rates of growth by region, level of government, occupational category, function, and so on, see the following series published for The Institute for Research on Public Policy: David K. Foot, ed., *Public Employment and Compensation in Canada: Myths and Realities*, Vol. 1 of Series on Public Sector Employment in Canada (Toronto: Butterworth for The Institute for Research on Public Policy, 1978); Meyer W. Bucovetsky, ed., *Studies on Public Employment and Compensation*, Vol. 2 of Series on Public Sector Employment in Canada (Toronto: Butterworth for The Institute for Research on Public Policy, 1979); Richard M. Bird, in collaboration with Meyer W. Bucovetsky and David K. Foot, *The Growth of Public Employment in Canada*, Vol. 3 of Series on Public Sector Employment in Canada (Montreal: The Institute for Research on Public Policy, 1979).

4. See Chapter 8, below, for a discussion of the impact of collective bargaining on wages, a comparison of wage developments in the public and private sectors, and related policy issues.

5. Employee organizations for collective bargaining evolved in most jurisdictions from existing associations of civil servants. Most of these associations were engaged in some form of consultative relationship with the government employer, and some of them already enjoyed a check-off of membership dues when formal bargaining legislation was enacted. See below, Chapter 5, p. 221 ff., Chapter 3, note 69, and Chapter 6, p. 248.

6. *The Directory of Labour Organizations in Canada* (Ottawa: Labour Canada, Central Analytical Services Branch, 1981) (hereafter referred to as *Directory of Labour Organizations*, 1981) shows that at the beginning of 1981, there were five public service unions with a membership in excess of 50 000: the Canadian Union of Public Employees, CLC (267 407 members); National Union of Provincial Government Employees, CLC (210 000 members); Public Service Alliance of Canada, CLC (154 743 members); *Centrale de l'enseignement du Québec*, independent (81 039 members); and *Fédération des affaires sociales*, CSN (*La Confédération des syndicats nationaux*) (75 000 members). There are also seven public service unions with between 25 000 and 50 000 members, fifteen with between 10 000 and 25 000 members, thirty-six with between 1000 and 10 000 members, and ten with between 250 and 1000 members. The *Directory* also contains an extensive list of independent local

organizations with a reported membership of fifty or more members. Included in this list are almost one hundred organizations of public or parapublic employees; most of these are police associations, college- and university-faculty associations, and professional employee associations.

7. *Directory of Labour Organizations*, 1981, p. 11.

8. *Ibid*. and *Labour Organizations in Canada* (Ottawa: Department of Labour, Economics and Research Branch, 1966).

9. Authors' estimate based on information extracted from the *Directory of Labour Organizations*, 1981. About 27 per cent of CLC members were in public service unions in 1978.

   The *Confédération des syndicats nationaux* (CSN), a Quebec-based labour federation, has an even higher proportion (approximately 50 per cent) of public employees in its membership, in spite of the fact that the union of provincial government employees, formerly affiliated with the CSN, broke ties with it in 1972.

10. CUPE was formed by a merger of the National Union of Public Employees and the National Union of Public Service Employees, former rivals for the allegiance of public employees in various provincial and municipal services. The PSAC came into being late in 1966 through the merger of the two largest staff associations in the federal public service, the Civil Service Federation of Canada and the Civil Service Association of Canada. The organizations had been rivals for virtually the same membership, but differed radically in their concepts of organization. The Civil Service Association had a highly centralized form of organization that cut across departmental lines; the Federation, on the other hand, was a rather loose group of departmental and direct affiliates.

    See Chapter 6, below, for a discussion of the structure of the merged organization, the PSAC, as well as information on other bargaining agents in the federal public service.

11. *Directory of Labour Organizations*, 1981, p. 15.

12. Authors' estimates based on information extracted from the proceedings of the Canadian Labour Congress' annual conventions and the lists of delegates to those conventions.

13. The question of bargaining rights for employees of hydro-electric commissions and other Crown corporations and government agencies was a contentious issue in some jurisdictions when the original labour legislation was being considered, but in most cases this matter was resolved, after some debate, by including these employees in the coverage of the legislation.

    Most provinces also gave bargaining rights to municipal employees under their general labour legislation at the time it was enacted. However, Ontario, New Brunswick and Prince Edward Island did so only at the option of the municipal employer. The power of municipalities to opt out of the legislation was dropped in Ontario in 1966, in New Brunswick in 1960, and in Prince Edward Island in 1971.

14. For discussion of the sovereignty issue with respect to labour relations, see, among other sources, Saul J. Frankel, *Staff Relations in the Civil Service: The Canadian Experience* (Montreal: McGill University Press, 1962), pp. 10–15 (hereafter referred to as *Staff Relations*); Kurt L. Hanslowe, *The Emerging Law of Labor Relations in Public Employment* (Ithaca, N.Y.: New York State School of Labor Relations, Cornell University, 1967), pp. 14–15; Louis B. Imundo, Jr., "Federal Government Sovereignty and Its Effects on Labor Management Relations", 26 *Labor Law Journal* (1975), p. 147.

15. *House of Commons Debates*, February 1951, p. 542, cited in Frankel, *Staff Relations*, p. 11.

16. Some authorities held that arbitration, rather than collective bargaining *per se*, was incompatible with the sovereign integrity of the public authority. See, for example, the remarks of F. P. Varcoe, Canada's Deputy Minister of Justice and Deputy Attorney General from 1941 to 1957, to a government employees' conference in 1960. In an address entitled ". . . A Look at the Inevitable: Collective Bargaining in the Public Service" (Canada Labour Congress: "Papers presented to a Government Employees Conference . . . Fredericton, N.B.", 5–6 May, 1960), Mr. Varcoe said:

> Does collective bargaining imply some 'abdication' of authority and responsibility? I assume in this connection that collective bargaining . . . would not involve any sort of compulsory arbitration for the determination of terms of employment. To vest by statute in an Arbitration Board power to fix the terms of employment would be a negation of the principles of responsible government.

In the Province of Quebec, where government employees have had comprehensive collective bargaining rights, including the right to strike, since 1965, the government has consistently refused to agree to arbitration of bargaining impasses. The Quebec government has also refused to allow arbitration of interest disputes in the health and education sectors, where it is also a party to the bargaining relationship and bears most of the financial cost of a settlement. The rationale for refusing arbitration, although the procedure is not prohibited by law, is that no third party should be given authority to determine matters affecting the provincial budget.

In New Brunswick, where arbitration, if both parties agree, may be the applicable dispute-resolution process, there has been only one instance where a dispute was arbitrated.

17. Civil Service Act, S.Q. 1965, c. 14.

18. Public Service Staff Relations Act, S.C. 1966–67, c. 72.

19. Public Service Labour Relations Act, S.N.B. 1968, c. 88.

20. Public Service Labour Relations Act, S.B.C. 1973 (Second Session) c. 144.

21. Public Service (Collective Bargaining) Act, S.N. 1970, c. 85, replaced in 1973 by S.N. 1973, c. 123.

22. The original Public Service Act of Ontario (1962) was replaced by the Crown Employees Collective Bargaining Act, S.O. 1972, c. 67, but the provision for arbitration of unresolved disputes remained unchanged. The Alberta Public Service Act was amended in 1971 (S.A. 1971, c. 89) to provide for arbitration of unresolved disputes that were previously settled unilaterally by the employer. More recent changes in the Alberta legislation (Public Service Employee Relations Act, S.A. 1977, c. 40) have made no difference in this respect. Arbitration was introduced in Manitoba by the Civil Service Act (S.M. 1969, Second Session, c. 3) and in Prince Edward Island in 1972, where it was introduced by special *Regulations* (E.C. No. 958/72) under the existing Civil Service Act (S.P.E.I. 1962, c. 5), rather than by new legislation. Nova Scotia government employees originally bargained under the Joint Council Act (R.S.N.S. 1967, c. 35), which has since been replaced by An Act Respecting Collective Bargaining in the Civil Service (S.N.S. 1978, c. 3). This new Act, like its predecessor, provides for binding arbitration of unresolved disputes.

23. Frankel, *Staff Relations*, pp. 1–2.

24. In addition to setting a pattern for some of the public sector legislation enacted after the PSSRA was passed, certain innovative features of the Act, such as the extension of bargaining rights to professional and supervisory employees, would eventually find their way into the general labour legislation. For a discussion of bargaining rights for professional and supervisory employees, see Shirley B. Goldenberg, *Professional Workers and Collective Bargaining*, Study No. 2, Task Force on Labour Relations (Ottawa: Queen's Printer, 1970); and Donald Fraser and Shirley Goldenberg, "Collective Bargaining for Professional Workers: The Case of the Engineers", 20 *McGill Law Journal* (September 1974): 456–79.

25. P.C. 1003 of 17 February 1944, clause 2(1) (*g*). The bodies and corporations that were thus brought under the Wartime Labour Relations Regulations (WLRR) were the following: (i) National Harbours Board; (ii) Bank of Canada; (iii) Canadian Broadcasting Corporation; (iv) Canadian National Railway System; (v) Trans-Canada Air Lines; (vi) Canadian Government Merchant Marine; (vii) Canadian National (West Indies) Steamships Ltd.; (viii) Dominion Government Arsenals and H.M.C. Dockyards at Esquimalt and Halifax; (ix) Canadian Wheat Board; (x) Commodity

Prices Stabilization Corporation Ltd.; and (xi) any corporation owned by the Government of Canada that was engaged in the manufacture, production or handling of war supplies or the supervision of any other person employed in such activities.

The National Harbours Board was specifically mentioned in the Wartime Labour Relations Regulations. The other bodies were dealt with by a provision in those Regulations that referred to P.C. 6702 of 26 August 1941, as amended by P.C. 1639 of 2 March 1942. By s. 12 of P.C. 6702, read together with P.C. 1003, postmasters and staffs of revenue post offices were covered by the WLRR, but postmasters and staffs of semi-staff post offices were excluded. A number of the agencies that were made subject to the WLRR, that is, the general labour relations legislation, were subsequently brought under the PSSRA. These included, for example, revenue post offices, the merchant marine, and the government dockyards at Esquimalt and Halifax.

26. S.C. 1948, c. 54, s. 54. The Act was stated to be applicable "in respect of any corporation established to perform any function or duty on behalf of the Government of Canada and in respect of employees of such corporations, except any such corporation, and the employees thereof, that the Governor in Council excludes. . . ." The same provision was included in the Canada Labour Code when it was amended in 1972. See S.C. 1972, c. 18, subsec. 109 (1). For a partial list of Crown corporations and similar entities that are subject to the Canada Labour Code, see Chapter 2, note 1, below.

27. There were a few earlier instances in which employee representatives became involved in what might be described as an official advisory or consultative capacity. During the period of implementation of the recommendations in the report of Arthur Young and Company on the classification of the Civil Service of Canada in 1919, "a Board of Hearing and Recommendation, which included employee representatives, was set up to hear appeals concerning reclassification and to make appropriate recommendations to the Civil Service Commission. . . . [The] Board ceased to operate once the reclassification project had been completed." L.W.C.S. Barnes, *Consult and Advise: A History of the National Joint Council of the Public Service of Canada, 1944–1974* (Kingston: Queen's University, Industrial Relations Centre, 1975), p. 16. (Hereafter referred to as *Consult and Advise.*) See also J.E. Hodgetts, W. McCloskey, R. Whitaker and V.S. Wilson, *The Biography of an Institution: The Civil Service Commission of Canada, 1908–1967* (Montreal: McGill-Queen's University Press, 1972), pp. 73–74. (Hereafter referred to as *The Biography.*) In 1924, under an order in council dealing with a salary revision of the entire service (P.C. 530, 29 March 1924), the Civil Service Commission was to consult, and did consult, with the civil service associations representing employees.

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For an account of what ensued, see Hodgetts *et al.*, *The Biography*, pp. 123–239. In 1928 an Advisory Committee to the Minister of Finance on the Superannuation Act had been set up (by Order in Council P.C. 2232). The Committee consisted of five government appointees and five appointees from the civil service associations. It was not until the enactment of the Public Service Superannuation Act, S.C. 1952–53, c. 47, that the Advisory Committee was given a statutory base (s. 29). See further Chapter 5, pp. 230–32, below. For other instances of consultation during the period, see Hodgetts *et al.*, *The Biography*, Chapter 8, "The Long Road to the Bargaining Table, 1918–1938".

28. *House of Commons Debates*, 24 February 1944, p. 779. See Barnes, *Consult and Advise* for a discussion of the role of the NJC both before and after the enactment of bargaining legislation; see Chapter 5, below, for more recent developments in the NJC, in particular some new initiatives by the Council in dealing with issues that might otherwise be the subject of formal collective bargaining.

29. John Swettenham and David Kealy, *Serving the State: A History of the Professional Institute of the Public Service of Canada, 1920–1970* (Ottawa: The Professional Institute of the Public Service of Canada, 1970), p. 47. (Hereafter referred to as *Serving the State*.)

30. This point was made in Frankel, *Staff Relations*, p. 9.

31. Authorization for the check-off of union dues was given on 24 March 1953. Barnes, *Consult and Advise*, p. 61, states:

> The achievement of the check-off had the immediate effects both of providing the staff associations with a more reliable financial basis for their operations and of freeing voluntary membership effort for redeployment in activities other than collecting dues. In the longer run it is doubtful whether any other single event in the fifties played a greater part in enabling the staff associations to develop and prepare themselves for the demands which were to be placed on them in the next decade.

32. Swettenham and Kealy, *Serving the State*, p. 57.

33. Barnes, *Consult and Advise*, p. 54, citing the editor of the *Railway Mail Clerk*, 1944.

34. *Ibid.*, p. 101.

35. Civil Service Act, S.C. 1918, c. 12 as amended by S.C. 1919 (Second Session), c. 10, s. 10.

36. When the PSSRA was enacted, the PRB, a neutral agency completely independent of government, was brought under the administrative jurisdiction of the PSSRB. The PRB's function is to provide objective data for the benefit of negotiators and arbitrators in the federal service. For further discussion of the PRB

and its role after the enactment of the PSSRA, see Chapter 13, p. 681 ff., below.

37. Hodgetts *et al.*, *The Biography*, p. 262.

38. *Ibid.*, pp. 264–65.

39. S.C. 1960–61, c. 57.

40. S. 7 and subsec. 68 (1).

41. Hodgetts *et al.*, *The Biography*, p. 286.

42. On 17 January 1962 President John F. Kennedy had issued Executive Order 10988, establishing a regime of collective bargaining in the United States Civil Service. As one observer pointed out, the Order spelled out "a clear-cut policy on the right of employees to organize, to have their organizations accorded official recognition, to be consulted in the establishment of personnel policies and procedures, and, under specified conditions, to negotiate agreements with agency management on working conditions." William B. Vosloo, *Collective Bargaining in the United States Federal Civil Service* (Chicago: Public Personnel Association, 1966), p. 2.

43. When Claude Edwards was elected president of the Civil Service Federation (1962), he was given a double mandate: to get collective bargaining rights for government employees and to bring about unity with the Civil Service Association of Canada. (See note 10, above.)

    The unity issue had been under consideration for a number of years, but assumed greater urgency as the possibility of collective bargaining came closer.

44. *Report of the Preparatory Committee on Collective Bargaining in the Public Service* (Ottawa: Queen's Printer, 1965), p. 1. (Hereafter referred to as *Report of the Preparatory Committee*.)

45. *Ibid.*, p. 40.

46. See Chapter 5, below.

47. S.C. 1966-67, c. 72.

48. S.C. 1966-67, c. 71.

49. S.C. 1966-67, c. 74. For a comprehensive account of events preceding the enactment of these statutes, see Barnes, *Consult and Advise*; Hodgetts *et al.*, *The Biography*; Swettenham and Kealy, *Serving the State*; Frankel, *Staff Relations*, pp. 1–200.

50. The inside postal workers had for some time been pressing for inclusion in the coverage of the IRDIA, which would have given them the right to strike. In 1962 they disaffiliated from the Civil Service Federation of Canada on this issue. None of the other staff associations was asking to be brought under the IRDIA at that time.

51. The strike began 21 July 1965, shortly after the *Report of the Preparatory Committee* was released, and continued until the end of the first week in August. It was settled when the government announced a yearly increase of $330 in place of the union's demand for $666. No disciplinary action was taken against postal workers who had engaged in the strike.

    Postal workers, in fact, had used the strike weapon, as early as 1918. A strike in that year lasted for ten days and ended only when the government made concessions to the employees on wages, working conditions, reclassification, hours of work, and overtime pay, as well as pay for the time employees had been on strike. There was also a strike of postal workers in 1924.

52. See also Chapter 10, p. 426 ff., below.

53. J. Finkelman, "When Bargaining Fails" in *Collective Bargaining in the Public Service: Theory and Practice* (Chicago: Public Personnel Association, 1967), p. 121.

54. *House of Commons Debates*, 31 May 1966, pp. 5787–88. Note should also be taken of subsec. 56(2) of the PSSRA, discussed at length in Chapter 4, below, and s. 112 of the Act, quoted in Chapter 4, pp. 153–54, below.

55. The Anti-Inflation Act of 1975 had an impact on collective bargaining in the public service, but it was of general application and was not applicable to public servants alone. Moreover, although the Anti-Inflation Act, like the PSCRA, placed a ceiling on increases in wages, it did not suspend collective bargaining rights, or interfere with the provisions of existing agreements as has the PSCRA. The Postal Service Operations Act of 1978 postponed the point of time at which a lawful strike in the Post Office could commence. See Chapter 10, pp. 479–80, below.

56. J. Finkelman, *Employer-Employee Relations in the Public Service of Canada: Proposals for Legislative Change* (Ottawa: Information Canada, 1974) and J. Finkelman, *Supplementary Observations and Recommendations* (Ottawa: Information Canada, 1975).

57. Canada. *Report to Parliament of the Special Joint Committee of the Senate and the House of Commons on Employer-Employee Relations in the Public Service of Canada*, 1976. First Session, Thirtieth Parliament 1974–75–76.

58. *Report of the Royal Commission on Financial Management and Accountability* (Ottawa: Minister of Supply and Services Canada 1979).

59. *Report of the Special Committee on the Review of Personnel Management and the Merit Principle* (Ottawa: Minister of Supply and Services Canada, 1979).

60. Discussed in Chapter 13, below.

2: Perimeters: the Coverage of the Legislation

What do we mean when we speak of 'the public service' in a collective bargaining context? Employees of departments of the federal government headed by a Minister of the Crown are obviously public servants in this context. But what of agencies over which the central administration exercises a lesser degree of control, such as administrative boards and tribunals, Crown corporations, publicly owned utilities, and agencies that derive a large part of their financing from the central administration? In the federal jurisdiction in Canada, some governmental bodies have been and are now subject to the the general labour-relations legislation (that is, the Canada Labour Code[1]), and some became subject to special legislation (that is, the Public Service Staff Relations Act [PSSRA]), only in 1967. Again, not all employees of the bodies to which each of these two statutes applies are accorded the right to have their terms and conditions of employment determined through collective bargaining.[2] In this chapter we shall try to identify, in particular, the governmental bodies that have been brought under the PSSRA and the classes of employees to whom this Act applies.

The Governmental Bodies

Section 2 of the PSSRA defines the term 'Public Service' to mean "the several positions in or under any department or other portion of the public service of Canada specified from time to time in Schedule I." The Schedule is divided into two parts. Part I comprises "Departments and other portions of the public service of Canada in respect of which Her Majesty as represented by the Treasury Board is the employer." Part II comprises "Portions of the public service of Canada that are separate employers." Part I includes two types of departments and agencies: departments named in Schedule A of the Financial Administration Act and a list of specialized boards, offices and agencies. The bodies listed in Part II of Schedule I of the PSSRA are those "subject in some degree to Government direction and control but having (by reason of statutory provision or administrative practice) or requiring (because of the nature of their function) a significant measure of independence in matters affecting rates of pay and conditions of employment."[3]

The number of departments and agencies included in the Schedule as originally enacted and the distribution between the two parts of the Schedule have not remained constant. Sections 4 and 5 of the PSSRA[4] empower the Governor in Council to add to or delete from Part I or Part II of the Schedule the name of any portion of the public service of Canada established before or after the adoption of the Schedule, provided it is a portion in which a Minister of the Crown, the Treasury Board, or the Governor in Council is authorized to establish or approve some or all of the terms and conditions of employment of persons employed there, and to delete the name of any portion of the public service from Part I or Part II and add it to the other Part. However, subsection 5(2) of the Act ensures that with certain exceptions, every portion of the public service of Canada, using the term in the broadest sense, will be covered either by the PSSRA or by Part V of the Canada Labour Code, that is, the part of the Code that deals with collective bargaining.[5]

The departments and agencies subject to the PSSRA as of 1 September 1981 are shown in Table 4, below.

The Public Servants

Which persons standing in an employment relationship (using that term in the broadest sense) to an employer are covered by any particular collective bargaining measure? There are two aspects to this question: an inclusionary and an exclusionary aspect. The two are often combined in the definition or coverage provisions of the relevant legislation. As far as the inclusionary aspect is concerned, the PSSRA applies to the persons employed in the "Public Service"[6] of Canada as described in the preceding section of this chapter.

Although the statutes of most Canadian jurisdictions had commonly excluded the members of some professions from the coverage of collective bargaining legislation, the Preparatory Committee on Collective Bargaining in the Public Service recommended that professional employees should be covered by the new public service legislation. The Committee took into account the long and responsible history of the organization of the professional employees in the public service and the significant role they played in the developing process of consultation over rates of pay and conditions of employment, and saw no good reason why this group should be denied access to collective bargaining. The recommendation was accepted.[7] This approach has since been followed in many other Canadian statutes dealing with collective bargaining in both the public and the private sectors.[8]

Exclusionary Provisions

We can ascertain the exclusionary aspect, in part, by referring to the exclusions listed in the definition of the term 'employee' in the definition section of the PSSRA and, in part, by reference to other relevant legislation. The following persons, among others, have been excluded by reason of the definition of the term 'employee'.

Persons Appointed to Statutory Positions

> (*a*) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act. . . .

This head was designed to exclude "officers of parliament, statutory appointees, deputy heads of departments, and so forth."[9]

The application of this head came before the PSSRB in the *Technical Inspection Case No. 1*.[10] The employer contended that steamship inspectors appointed under the Canada Shipping Act were appointees of the Governor in Council and therefore came under this exclusionary provision. Subsequently an order in council was issued under subsection 34 (1) of the Public Service Employment Act, applying that Act to steamship inspectors; any doubt the employer had entertained concerning the applicability of the PSSRA to steamship inspectors was therefore removed.

Locally Engaged Persons

> (*b*) a person locally engaged outside Canada. . . .

The reason for the exclusion of such persons was that they fall within the jurisdiction of other sovereign states, and Canada "cannot, by anything we do here, presume to establish employer-employee relations with respect to employees who may come under the jurisdiction of other legislation in other national jurisdictions."[11]

Persons Paid by Fees of Office

> (*c*) a person whose compensation for the performance of the regular duties of his position or office consists of fees of office, or is related to the revenue of the office in which he is employed. . . .

The position of the government on this head of exclusion was that "where a person's compensation is based upon fees of office or related directly to revenue there is not an employer-employee relationship . . . [but] rather a contractual or agent relationship." The exclusion was intended to apply to "election clerks, returning officers, shipping masters at small ports, nautical assessors, port wardens, annuity agents, postage stamp sales agents and the like."[12]

Part-Time and Casual Employees

> (*d*) a person not ordinarily required to work more than one third of the normal period for persons doing similar work. . . .[13]
>
> . . .
>
> (*f*) a person employed on a casual or temporary basis, unless he has been so employed for a period of six months or more. . . .[14]

The explanation given for both these heads of exclusion was that the line had to be drawn somewhere. Although admitting that there were theoretical problems involved, a spokesman for the government said:[15]

> The real problem is how far you can go in recognizing the attachment of employees who are short term, casual or temporary employees as permanent employees who are potentially permanent members of a bargaining unit, whose votes may determine who is recognized and who is not recognized as the bargaining agent for the bargaining unit; whose votes may or may not determine whether or not the option is going to be for the arbitration or conciliation board approach; whose votes may determine whether or not a proposal which is put forward on the negotiating table and agreed to is or is not going to be acceptable to the majority of the membership of the bargaining unit.

A practice had developed of breaking the employment of casuals and temporary employees and re-employing the same persons on the same duties a few days later. To overcome this practice, the Treasury Board directed, on 28 May 1969, that where the break in such a person's employment was of no more than five working days, the person would be accorded the terms and conditions of employment under the applicable collective agreement. (The break period had been three days.) In addition, where such a person who had become subject to a collective agreement had ceased to be employed and was reappointed on a similar basis within three months, he was to continue to be subject to the applicable collective agreement. However, problems in this area continued to arise.[16]

In the *University Teaching Case No. 1*[17] the applicant seeking certification contended that two classes of teachers, those engaged on an 'academic year' basis who were usually re-engaged but had not acquired tenure that entitled them to re-engagement, and those who had been engaged for the first time for one academic year, were persons engaged on a casual or temporary basis. Since such persons were employed in July, and the application was made in December, the applicant submitted that they had not been employed for a period of six months, and that they were therefore not 'employees' within the meaning of the PSSRA. The PSSRB rejected the submission.

In *Public Service Alliance of Canada and the Commissioner of the Yukon Territory*,[18] the Yukon Public Service Staff Relations Board held that seasonal employees who return on a recurring basis in successive years are casual or temporary employees and cannot be said to accumulate their respective terms of service so that they may be regarded as having been employed on a casual or temporary basis for six months or more.

Persons Excluded by Reason of Employment in Certain Agencies or Institutions or as Independent Contractors

Two groups of excluded employees are listed in the definition of the term 'employee' by reference to the institutions in which they are employed: that is, persons employed by or under the PSSRB and persons who are members or special constables of the Royal Canadian Mounted Police (RCMP) or who are employed by the RCMP under terms and conditions substantially the same as those of its members. It is obvious that since the PSSRB[19] was established to administer the collective bargaining regime provided for by the PSSRA, persons belonging to the first group would find themselves in a conflict of interest if they were able to avail themselves of the provisions of that Act. The Preparatory Committee expressed the view in its *Report* that it would be impractical to apply the provisions of the Act to persons belonging to the second group because of the nature of their duties and because their conduct is subject to a special code of law and discipline.[20]

Members of the Armed Forces of Canada[21] and the staffs of the Senate, the House of Commons and the Library of Parliament, although not mentioned in the PSSRA, are nevertheless excluded from the provisions of that Act,[22] as are persons engaged on "personal service" contracts. The problem of where to draw the line between a 'contract of service', under which the person who renders the service is deemed to be an employee, and a 'contract for services', under which the person rendering the services is deemed not to be an employee, is a difficult one.[23] For example, the question of whether a person engaged by the National Film Board as a 'freelancer' is an 'employee' within the meaning of the Act or, alternatively, is a person engaged on a personal service contract who is not an 'employee' came up for consideration by the PSSRB in *Le Syndicat général du cinéma et de la télévision and the National Film Board*.[24]

The PSSRB's initial decision (based on an interpretation of the provisions of the National Film Act) held that the freelancers were not employees. This decision was reversed by the Federal Court of Appeal,[25] which held that "notwithstanding the form which . . . an engagement takes, it may be open in a particular case to show on all the circumstances that the relationship is in fact one of employment" and that the "general tests for distinguishing between an employee and an independent contractor" must be applied. The matter was therefore remitted to the PSSRB. The Board's later decision of 17 January 1979 contains a detailed discussion of the application of "the general tests" to the various contractual relations between the National Film Board and its freelancers.[26]

Persons Employed in a Managerial or Confidential Capacity

The last group of exclusions listed in the definition of the term 'employee' in the PSSRA comprises persons employed in a managerial or confidential capacity.[27] In many statutes the exclusion of this group is effected simply by declaring that persons who exercise managerial functions — the phrase is not further defined — or who are employed in a confidential capacity are deemed not to be employees; the determination of which employees are to be so characterized is left to the discretion of the labour relations board.[28] When the Preparatory Committee approached the problem of dealing with 'managerial exclusions', it entered new territory. Private industry's practices applied to production and maintenance operations. The practices applying to large organizations of office employees had not yet fallen into a clear pattern.[29] The Committee concluded that "the basic principle of 'conflict of interest'[30] which is recognized in all jurisdictions, should apply in the Public Service," and it proceeded to identify "a number of specific groups of individuals whose duties and responsibilities would call for exclusion from bargaining units." The Committee's recommendations were incorporated in the PSSRA (section 2) in the form of a definition that spelled out the meaning of the term 'person employed in a managerial or confidential capacity'. We shall deal with the several heads of the definition one by one.[31]

Persons employed in a confidential capacity to a number of specified officials.

> (*a*) [A person] employed in a position confidential to the Governor General, a Minister of the Crown, a judge of the Supreme or Federal Court of Canada, the deputy head of a department or the chief executive officer of any other portion of the Public Service. . . .

Whether a person comes under this head must be determined on the basis of each situation; the authority of the PSSRB is limited to finding whether the person concerned is employed in a confidential position relative to one of the positions enumerated. There is no requirement that the confidentiality pertain to management-related functions.[32] However, in *Patry and Young*,[33] the Board held that it was not sufficient to find a confidential relationship between the person concerned and the person to whom he was claimed to stand in a confidential relationship.

> The Board must determine whether a particular person is in a *position* that is confidential to any one of the persons specified . . . . In other words, the confidential relationship is not casual or fortuitous. If it is not explicitly set out in a job description, it should at least be inferrable from the evidence that it is implicit in the carrying out of the duties and responsibilities of the particular position.

Persons employed as legal officers.

> (*b*) [A person] employed as a legal officer in the Department of Justice. . . .

The only question that the Board can consider under this head is whether the person concerned is so employed, a matter in which there can be little room for doubt.[34]

On 31 March 1969 the Professional Institute of the Public Service of Canada was certified as bargaining agent for a unit of employees in the law occupational group, which was then made up of sixty-four employees. On 1 September 1981 the unit consisted of thirty-seven employees since most of the other persons classified as coming within the law occupational group had been assigned to the Department of Justice. In *MacDonald*[35] counsel for the employer, in the course of his argument, stated that the unit is now composed principally of Pension Advocates whom he considered "specialized legal aid lawyers". In that case the Board noted that persons employed as legal officers elsewhere than in the Department of Justice do not fall under this head, and that the employer must rely on some other head to justify their exclusion. In *Cuddihy and Norton*[36] the employer sought to exclude two members of the legal staff of the Canadian Transport Commission, who were not legal officers in the Department of Justice, on the ground that they were in a position confidential to a person described in head (*c*).[37] The PSSRB granted the request of the employer, and its decision was upheld by the Federal Court of Appeal.[38] In the course of an oral judgment, Jackett C.J. said:

> When a portion of the government service has a legal adviser, in the nature of things, his services are provided on a confidential basis, and, when it has a legal branch, the responsibility of the director of that branch is to provide such services, and to discharge that responsibility he must have the help of lawyers whose services must be provided to him or as directed by him on a confidential basis. If such a lawyer is not in a confidential position in relation to the director of his branch, or as the statute puts it, "confidential to" the director, I have difficulty to conceive, on the basis of my experience, of any person in the Public Service who is "confidential to" any other person in the Public Service.

Persons who have executive duties.

> (*e*) [A person] who has executive duties and responsibilities in relation to the development and administration of government programs. . . .

In interpreting the phrase 'executive duties and responsibilities' in this head of exclusion, the PSSRB said in *MacDonald*:[39]

> Although "executive duties and responsibilities in relation to the development and administration of government programs" may be difficult to define in specific terms, it is obvious that the [PSSRA] does not contemplate that *all* duties which relate to the development and administration of government programs are "executive" in nature. The words "duties and responsibilities" in . . . the definition have been qualified by the word "executive" and the whole therefore contemplates duties and responsibilities of a senior level. When we couple with these words the further limiting phrase "in relation to the development and administration of government programs" it is evident that these executive duties and responsibilities must be of such a nature that they have a primary influence on the development and administration of policies or programs which may involve the utilization of financial, material or personnel resources.

In *Cram*[40] the PSSRB stated concerning the last sentence of the preceding decision:

> It was possible to decide the *MacDonald Case* without subjecting the term "executive duties and responsibilities" to a more precise analysis. While it is generally true to say that executive duties and responsibilities devolve on persons occupying senior positions in an administrative structure, it is not sufficient, for the purposes of applying the statutory definition, to add that they "must be of such

> a nature that they have a primary influence on the development and administration" of particular programs. In our opinion executive duties and responsibilities must also entail a significant degree of decision-making authority.

In this case the PSSRB expressed its disagreement with a view set forth previously in *Pfeffer*[41] that advisory duties can be regarded as executive. On the contrary, the PSSRB said: "Executive functions and advisory functions are not synonymous even though the advice proffered may be invariably accepted and the same person may be required to perform both functions. The [PSSRA] is specific in setting out executive, and not advisory, duties and responsibilities as grounds for exclusion under paragraph (c) of the definition of persons employed in a managerial or confidential capacity." Accordingly, where the evidence reveals that the duties and responsibilities of the person concerned are technical in nature and that his role in relation to his superiors is primarily that of a technical adviser, the PSSRB has held that he does not fall within this head of exclusion.[42] Mere participation in planning policy, program development, and resource-allocation activities in relation to a government program is not in itself sufficient for this purpose.[43] The Board has held that to be excluded under this head, a person must be entrusted with duties and responsibilities that relate to *both* the development *and* the administration of government programs.[44]

On the question of the meaning of the term 'government programs', the PSSRB said in *Lalonde*:[45]

> The fact that a particular plan of action towards some stated goal is developed and administered in the context of the operation of the government is not a sufficient reason for designating it as a *government* program. There must be hundreds of such plans of action within the various subdivisions of departments or agencies that are labelled as programs — vehicle maintenance, personnel training, consumer information, navigation aids, purchasing, capital expenditures, animal inspection, etc., etc. These cannot, however, be considered to be government programs within the meaning of . . . the definition. . . . [We] believe that the Estimates provide a useful avenue of approach to this question.

However, the Board commented that it would probably be too restrictive to suggest that the term 'government programs' should be limited to programs that are directly established by statute or are at least recognized in the Estimates as requiring a special vote. In *Leblanc*[46] the bargaining agent contended that to be designated under this head, a person had to have responsibility for all projects in what was described as 'the Ottawa program in the Design and Construction Branch of the Department of Public Works'. The Board expressed the view that

> ...responsibility for "program" (or "programs") cannot be given the restricted interpretation that has been proposed. Indeed, if that were the test, it would have the effect of precluding the designation of anyone but the person heading up the Ottawa Program regardless of its scope and complexity in administration. On the other hand, being responsible for any project, regardless of its size and content, is not automatically equivalent to a person's having executive duties and responsibilities in relation to the development and administration of government programs. Obviously, each case must be decided on its merits. . . .

Persons involved in personnel administration or collective bargaining.

> (*d*) [A person] whose duties include those of a personnel administrator or who has duties that cause him to be directly involved in the process of collective bargaining on behalf of the employer. . . .

Under this head the PSSRB has excluded a person who is a part of management's negotiating team,[47] but not a person whose involvement is limited to giving technical advice to policy makers in the field of personnel administration.[48]

Persons who deal with grievances.

> (*e*) [A person] who is required by reason of his duties and responsibilities to deal formally on behalf of the employer with a grievance presented in accordance with the grievance process provided for by this Act. . . .

In the *Economics, Sociology and Statistics Case No. 1*[49] the PSSRB held that this head of exclusion is not limited to a grievance officer whose authority is confined to grievances presented by employees in the bargaining unit for the occupational group in which he is classified. He may be designated if he is authorized to deal with grievances presented by employees in any bargaining unit or in no bargaining unit.

In some instances a person who is the immediate supervisor of an employee appears to have considerable authority to deal effectively with the complaints of an employee. In *Townshend et al.*[50] the PSSRB held that:

> There is a clear distinction to be drawn between complaints of employees, regardless of whether they may ultimately form the basis of a grievance, on the one hand, and grievances presented by employees at the first level of the grievance procedure, on the other. Only the latter can properly be taken into account by the Board in making its determinations on the persons proposed for designation [under this head].

In *International Brotherhood of Electrical Workers, Local 2228 and Treasury Board*,[51] on a reference to adjudication under section 98 of the PSSRA, discussed in Chapter 11, below, the adjudicator held that if a collective agreement lacked an applicable provision, a person could be designated by the employer as the immediate supervisor and as the person who represents the employer in the first step of the grievance procedure.

The extent of the authority that a person must have to warrant his exclusion under head (*e*) was dealt with by the PSSRB in an early (1968) case, the *Foreign Affairs Case No. 1*;[52] the views expressed in that case have been endorsed and applied in many later decisions. The Board held that a person could be excluded if he had been endowed by his employer with some authority of substance to give a binding decision on his own initiative on some, but not necessarily all, types of grievance.[53] The Board noted that there were certain limitations on the power of officers at the lower level of the grievance process to make an effective decision on some types of grievance. Thus, in the central administration, authority to discharge an employee rests only with the deputy head or his delegate, and then only after approval by the Treasury Board.[54] A similar limitation applies in connection with grievances relating to promotion, where the Public Service Employment Act applies. However, the Board said, it must be shown that the person concerned does not serve merely as a channel for the transmission of grievances to a higher level before he takes action.[55] This situation would exist if his ostensible authority were limited by directions, expressed or implied, or by custom that requires him to refer to a superior for advice and guidance concerning each complaint brought to him.

This head of exclusion has been a constant source of friction between bargaining agents and the employer because of the agents' allegations that the employer has been prone to designate an excessive number of officers at various levels in the grievance process, particularly at the first level. The situation was all the more objectionable in the eyes of the bargaining agents because the exclusion of a person at the first level of the grievance process almost invariably led to the exclusion of that person's secretary on the ground that the secretary was employed in a position confidential to the grievance officer.[56] The concern of the employee organizations was first brought to the attention of the PSSRB on an application for certification by the Professional Association of Foreign Service Officers in 1968. In its decision in that case — the *Foreign Affairs Case No. 1* — the Board conceded, as counsel for the employer in fact admitted, that the employer might abuse its authority to designate officers as steps in the grievance process. However, the Board said that the likelihood of abuse was offset by a number of factors. For example, the employer's position on the need for designation of various persons at certain levels in the grievance process could be canvassed in the course of bargaining, and the bargaining agent would have an opportunity of persuading the employer to reduce the number of persons so designated. In addition the employer, in its own self-interest, would have to choose the persons it designates with great care because, in so doing, it would be vesting in those persons authority to give replies to grievances that would be binding on the employer: the dispersion of authority would pose a considerable risk for the employer. The PSSRB went on to say that a bargaining agent would be free to file a complaint that the employer, by excessive designation of grievance officers, was violating the 'unfair practices' provisions of the PSSRA.[57] However, experience over the years since the decision of the Board in the *Foreign Affairs Case No. 1* has caused the bargaining agents to doubt whether there can be effective recourse to the 'remedies' that the Board believed to be available in case the employer abused its authority to designate grievance officers. Bargaining about the grievance process has been confined to such items as the manner and form of presenting grievances, the number of levels or steps in the grievance process, time limits, and so on; it has not included the number of officers who might be designated at any level or step, since the employer has taken the position that under subsection 99 (4) of the Act, it, and it alone, is entitled to designate the number of officers who are to function at each level or step.[58] In addition the bargaining agents have not met with any measure of success in invoking the 'unfair practices' provisions of the Act or other avenues of relief in this area.

Persons employed in positions confidential to others employed in a managerial or confidential capacity.

> (*f*) [A person] who is employed in a position confidential to any person described in [heads (*b*) to (*e*) above.]

It is not sufficient for the purposes of exclusion under this head to show that the person concerned has access to confidential information.[59] As the PSSRB said in *Gamble*,[60] "the confidentiality of such information is guarded by his or her oath of secrecy and affords ample protection to the Employer. The word 'confidential' in [this head] refers, not to the material handled, but rather to the relationship between the person proposed for designation under [this head] and the person described in [heads] (b), (c), (d) or (e)." The Board cannot concern itself with the personality of the person whom the employer seeks to designate, but with the duties or responsibilities of the position he occupies.[61] In addition it is not sufficient to show that the person concerned is employed in some sort of confidential relationship to a person described in heads (*b*) to (*e*). The confidential relationship that warrants exclusion under head (*f*) must relate to the exercise of the managerial duties and the discharge of the managerial responsibilities of the person to whom he stands in a confidential relationship.[62] No similar restriction, either expressed or implied, is to be found in relation to confidentiality under head (*a*).[63] Where an employer seeks to designate someone under this head as a person employed in a position confidential to a person who has executive duties and responsibilities (head [*c*]), the confidential relationship must relate to *both* the development *and* the administration of government programs.[64]

In the *Air Traffic Control Case No. 3*,[65] the PSSRB held that since the definition of head (*f*) uses the word 'described', a person may be designated under this head, even though the person to whom he stands in a confidential relationship has not been previously designated. In a proceeding in such a situation, it is necessary, as a preliminary step, to establish that the person 'described' does come within any of heads (*b*) to (*e*). The Board said that the types of cases in which this approach is applicable are the following:

> [i] Where the superior is included in a bargaining unit for which a bargaining agent has been certified, but the superior has not been designated;

[ii] Where the superior is in an occupational group for which no bargaining agent has been certified, or

[iii] Where the superior falls within head [*b*].

In *Cuddihy and Norton*, in 1971, the PSSRB stated that Parliament must have intended head (*f*) to apply in those circumstances, at least, where a person designated under heads (*b*) to (*e*) is compelled by the weight of his duties to pass to another person some of those duties that constitute the basis of his designation under heads (*b*) to (*e*) and to relv substantially on the person to perform them if the duties involved in the delegation require skill, judgment, trust and confidence. The second type of confidential person would be someone performing secretarial duties for a person designated under heads (*b*) to (*e*), where the secretarial duties are related to the duties that constitute the basis of that person's designation under heads (*b*) to (*e*). The Board acknowledged the lack of definition in its statement and suggested that lack of definition was inherent in the process of determining which persons are 'confidential'.[66]

The PSSRB's decision in *Cuddihy and Norton* was upheld by the Federal Court of Appeal,[67] but the Court expressed no opinion concerning the principles enunciated by the Board in that case. Afterwards the principles were consistently applied by the Board[68] until 1978 when, in *MacDonald*,[69] the Board's decision was referred to the Federal Court of Appeal. The Court upheld the Board's decision on the merits, but in the course of his reasons for decision, Pratte J. said:[70] "In so far as I can understand them, the so-called 'principles' applied by the Board appear to me not only to be wrong but to bear no relation at all with the question to be determined. The word 'confidential' in head (f) of the definition is used in its usual sense which, contrary to what the Board assumed, does not imply any delegation of functions."

In view of the foregoing decision of the Federal Court of Appeal, the PSSRB reconsidered its policy under this head in *Sisson*.[71] From a reading of the decision of the Supreme Court of Canada in *Labour Relations Board for British Columbia et al.* v. *Canada Safeway Limited*,[72] it found that the following principles emerged:

- The mere "fact that an employee has access to confidential information does not [of itself] mean that he is employed in a confidential capacity."
- To be considered a confidential exclusion, there must exist between the particular employee and the employer "a relation

of a character that stands out from the generality of relations and bears a special quality of confidence." Between the management and the confidential employee there is an element of personal trust which permits some degree of 'thinking aloud' on special matters.

- "In many instances it is of the essence of the confidence that the information be not disclosed to any member of any group or body of the generality of employees."

The Board said that following the *Canada Safeway Ltd.* decision, the various labour-relations boards in Canada had developed a threefold test to be applied in determining whether a person qualifies as a confidential exclusion, and it adapted this test to the provisions of the PSSRA. The test is as follows:

- The confidential matters to which the person has access must relate to the duties performed by a person described in heads (*b*), (*c*), (*d*) or (*e*).
- The disclosure of the information would adversely affect the employer.
- The person must be involved with this information as a substantial and regular part of his duties. It is not sufficient that he occasionally come in contact with it.[73]

Others whom the PSSRB considers should be designated.

> (*g*) [A person] who is not otherwise described in [heads (*c*) to (*f*)], but who in the opinion of the Board, should not be included in a bargaining unit by reason of his duties and responsibilities to the employer.

In *Gestrin and Sunga*, the PSSRB said:[74]

> [This head] vests in the Board a wide discretion. Its language provides little guidance for the Board as to the principles that the Board ought to apply in making a determination that a person falls within that head. A perusal of the discussions before the Special Joint Committee of the Senate and of the House of Commons on Employer-Employee Relations in the Public Service and in the debates on Bill C-170 both in the House of Commons and in the Senate also offers no assistance other than that it was not possible at the time the Bill was under consideration "to foresee all the circumstances under which it might be proper for the employer to put forward a proposal to exclude an individual as being employed in a managerial capacity"; the inclusion of a "catch all" clause was deemed necessary to enable the Board to deal with special situations. Since we are left to our own devices, it seems to us that

> head [*g*] should be used to permit the designation of persons who, although not otherwise described in heads [*c*] to [*f*], are in essence to be regarded as members of what might be referred to as "the management team".

The two persons concerned in this proceeding were respectively the Assistant Secretary to the Cabinet Committee on Planning and Priorities, who had also acted more recently as Assistant Secretary to the Cabinet, and a Privy Council Officer in the Cabinet Secretariat (Operations) in the Social Development Division. The Board found that:[75]

> In a very real sense they may be said to participate in management decisions. Perhaps it might be well to point out that, when we speak of management decisions, we are not confining that phrase to decisions relating to industrial relations; the phrase comprehends a wide complex of decisions concerning the whole government enterprise and the welfare of the country as a whole.

The representative of the bargaining agent had submitted that the only effect of including the two men in the bargaining unit would be to have their terms and conditions of employment determined by collective bargaining rather than unilaterally by the employer. In rejecting this submission, the PSSRB said:[76]

> If that were all that was involved, we might be inclined to go along with him. However, there is much more that has to be considered. If Messrs. Gestrin and Sunga are not to be designated, they would not only be entitled to have their terms and conditions of employment determined by collective bargaining; they would also be entitled to sit at the bargaining table as members of the bargaining agent and not only for the bargaining unit in which they would be included but for other bargaining units as well. At the same time they would be participating in the formulation of management policies that might, if not directly, certainly indirectly but materially, have a profound effect on the bargaining process. It is inconceivable to us that Parliament intended that a person should be placed in a position where he has his feet under both sides of the bargaining table at the same time.

The principles set out in *Gestrin and Sunga* have been applied consistently in later cases,[77] although, as the PSSRB said in *Lemieux*,[78] the concept of 'the management team' has never been 'accurately defined'. In that case the Board noted that a number of guide-lines had been enunciated that had been generally followed: for example, that the persons involved participate in, or are privy to, the processes of formulating policies or making decisions or administrative management at the higher levels of the particular sector of the public service in which they are employed. In *Jones*[79] the Board said that in adopting the expression 'the management team', it

> ...was not identifying personnel of some readily identifiable administrative body which may meet regularly to assess and resolve problems inherent in the management or utilization of financial, material or personnel resources within an organizational unit in the Public Service. Participation in the activities of a particular committee may, or may not, be of significance. The presence or absence of support staff as well as the occasion of acting in the place of a superior may, or may not, be vital criteria for the determination of a person pursuant to [head] (g). Each case must be decided on its own circumstances.

As to the extent and nature of such participation, the Board has held that a person is not to be regarded as a member of the management team if his duties are of a routine administrative or advisory nature and if he does not exercise independent initiative.[80]

The mere fact that a person exercises supervisory functions over other employees does not in itself bring a person within the management-team concept.[81] The PSSRA expressly provides for the certification of bargaining units comprised of, or including, supervisors.[82] However, the term 'supervisor' is not defined in that Act, and there is no clear answer to the problem of where the line is to be drawn between a person who has supervisory functions, but is to be treated as an 'employee' for all purposes of the Act, and a person who is excluded because he is employed in a managerial capacity. The distinction must be ascertained in each particular case by reference to the jurisprudence that has developed.

In *Lemieux* the principle that underlies *Gestrin and Sunga* was carried a step further. The PSSRB said that:[83]

> ...if it can be said that *all* cases of membership on the management team entail the likelihood of conflict of interest, it does not follow that *all* cases of conflict of interest are necessarily linked to membership on the management team. In other words, a person may be excluded under [head] (g) even if he could not be considered a member of the management team, provided that the proven conflict of interest is latent in duties and responsibilities to the employer which are not otherwise described in [heads] (c) to (f).

The Board added that "it must be persuaded that there is a real likelihood of conflict between Mr. Lemieux's duty to the

Employer and his interests as a member of a bargaining unit."[84]

Until recently the government's policy relating to the identification of a 'management team' could scarcely be described as one that was applied with any degree of consistency throughout the public service. In the last few years several reports have discussed the problem and suggested how it should be dealt with.[85] Indeed, in 1978, two Bills were introduced containing provisions to implement some of these suggestions, but neither went beyond first reading. Bill C-28, introduced on 8 March 1978, would have created a new occupational category, that is, a managerial occupational category, and would have excluded from the PSSRA's definition of the term 'employee' not only "a person employed in a managerial or confidential capacity", as the case is under the Act as it stands, but also:

> 1. (1) (*i*) a person who is determined to have or exercise senior professional duties and responsibilities, or is determined to have or exercise managerial duties and responsibilities in relation to the formulation or implementation of policies and programs or the effective control of employees, by the person being employed
>
> (i) in a position that is classified in the managerial occupational category, or
>
> (ii) at an annual rate of pay equal to or greater than $33,500.

To enable necessary adjustments to be made in the $33 500 figure in order to conform to changes in salary levels in the public service, the Governor in Council was empowered, by order, to amend that figure at intervals, subject to scrutiny of the order by Parliament upon motion of fifty members of the House of Commons or twenty members of the Senate.

On 21 November 1978, Bill C-22 was introduced. It substituted the following clause for head (*c*):

> (*c*) has or exercises
>
> (i) executive or managerial duties and responsibilities in relation to the formulation, implementation, or administration of government policies or programs, or
>
> (ii) effective control of employees;
>
> (*c*.1) makes significant recommendations in relation to the functions described in paragraph (*c*).

In a news release of 8 March 1978, the Treasury Board estimated that among employees of whom it was itself the 'employer', Bill C-28 would have reduced the confidential exclusions from 11 500 (3.8% of a total 300 000 public servants) to 8000 (2.7%) and would have increased the managerial exclusions as defined in the Bill from 12 500 (4.5%) to 20 000 (6.7%). The same estimates were contained in a news release of 21 November 1978 in relation to the effect of Bill C-22.

The Economists', Sociologists' and Statisticians' Association presented to the International Labour Organization Governing Body, on 6 March 1978, a complaint of infringement of trade-union rights in Canada. The Association alleged that Bill C-28 violated the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), which had been ratified by Canada, in that it denied freedom of association to a certain category of employees. The complaint stated that the government was taking away from senior professional employees, employees of the Treasury Board, and employees who had salaries above a certain scale, the freedom to associate in a trade union for the purpose of bargaining collectively on wages and conditions of employment. Submissions were also made by the Public Service Alliance of Canada and the Chairman of the Staff Side of the National Joint Council of the Public Service of Canada. In its reply the government stated that Parliament had been prorogued and Bill C-28 was no longer on the Order Paper. Nevertheless, the Committee on Freedom of Organization, in its report to the Governing Body (Case No. 903) considered it useful to make certain general observations regarding the Bill. It pointed out that the Bill appeared to deny freedom of association to a certain category of employees and recalled that by virtue of the Convention of 1948, "Workers . . ., without distinction whatsoever, shall have the right to establish and . . . to join organizations. . . ." The only exception provided for by the Convention applied "to the armed forces and the police." It also drew attention to the Labour Relations (Public Service) Convention, 1978 (No. 151) which calls for taking measures appropriate to national conditions to encourage and promote the development of machinery for negotiating terms and conditions of employment between public authorities and public employees' organizations. It stressed, however, that the 1978 Convention declares that "the extent to which the guarantees provided for in Convention No. 151 shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations." The Committee recommended that since Bill C-28 was no longer on the Order Paper and was therefore no longer subject to the foregoing observations, the Governing

Body should decide that the case did not call for further examination.

A New Management Category

On 10 July 1980 a news release from the Treasury Board announced that in response to the recommendations in the several reports referred to earlier, as well as in the periodic reports of the Advisory Group on Executive Compensation,[86] a new management category was being established. The news release stated in part:

> The Management Category will consist of some 5,000 positions occupied by managers who are excluded from collective bargaining or not represented by any bargaining agent. These include:
>
> (a) positions occupied by employees in the Senior Executive Category;
>
> (b) positions occupied by Senior Executive equivalents;
>
> (c) positions that are at or above the Program Administration (PM) level 7 or equivalent levels in other occupational groups.
>
> Managerial positions in the medical and legal officer groups generally will not be affected. These groups are limited in size and there is little movement between these and other managerial positions.[87]

The new category consists of two groups: those classified as EX, all of whose members were persons who had been previously designated or were excluded from the collective bargaining provisions of the PSSRA, and those classified as SM, most, but not all, of whose members had been previously designated. The conversion of the first group had been completed and took effect on 1 April 1981. The conversion of some persons in the second group had not been completed by 1 September 1981 because they had not previously been designated and had to await the results of the designation process.

Exclusions under the 'Saving Provision'

The PSSRA contains a 'saving provision', section 112, whereby action taken by the government to protect the safety or security of Canada or of any state allied or associated with Canada is exempt from the provisions of that Act or, in fact, of any other Act. Under the authority of this provision, a number of electronic technicians holding positions identified by position number were removed from the collective bargaining community by order of the Governor in Council.

Process for Determining Whether 'Persons' Are 'Employees'

In what we might describe as the normal course of the process for certification of a bargaining agent, the agency empowered to grant certification will be called on, as part of that process, to determine whether certain 'persons' are 'employees': that is, whether they fall within the inclusionary or exclusionary provisions of the legislation. After a bargaining agent has been certified or has acquired voluntary recognition, where such a course is permitted under the applicable legislation, questions may arise relating to this point. An employer may assign new or additional duties to a person, which the employer alleges bring that person within an excluded class; or a person may be appointed to a new position where the duties and responsibilities, in the view of the employer, place that person within an excluded class. Section 2 of the PSSRA deals with such situations in its definition of the term 'person employed in a managerial or confidential capacity'. The definition falls into two parts. Heads (*a*) and (*b*)[88] list types of persons: those confidential to specified senior officers of government or to the federal courts and those employed as legal officers in the Department of Justice. For persons who may be covered by heads (*c*) to (*g*),[89] the definition prescribes as the appropriate procedure for determining whether they fall within the managerial or confidential class that they must be designated by the PSSRB on an application for certification; alternatively after certification, they may be 'designated' by the employer in a manner prescribed by the Board, subject to objection by the bargaining agent. If an objection is raised, the determination is to be made by the Board.

Where an application for certification is made by an employee organization, the PSSRB directs the employer to file, along with other material, a list of persons who, in the view of the employer, are employed in a managerial or confidential capacity. The registrar serves a copy of the list on the applicant, and the organization has a limited time within which to file a statement indicating whether it agrees or disagrees with each name on the list.[90] Where the applicant disagrees with the claim of the employer concerning any individual, and the Board nevertheless makes a determination upholding the employer's claim, the person concerned is identified by the Board in its decision as a person employed in a managerial or confidential capacity. Where the applicant agrees with the employer's claim, the

Board's practice has been to include in its decision a statement that having regard to the agreement of the parties, the Board 'designates' the persons concerned as persons employed in a managerial or confidential capacity.[91]

After a bargaining agent has been certified, the PSSRB's *Regulations and Rules of Procedure*[92] provide that the employer, if it wishes to designate a person under heads (*c*) to (*g*), must file with the registrar a statement setting forth the name of the person concerned and relevant information, such as his job description, the head in which such person is described and, where the person concerned is claimed to fall under head (*f*), the position, title, and occupational group of the person to whom the position of the concerned person is confidential.[93] The registrar serves a copy of the statement on the bargaining agent, which has a limited time within which to file a notice of objection. If no objection is filed by the bargaining agent within the prescribed time, the person concerned is deemed to be designated a person employed in a managerial or confidential capacity.[94] In many instances the bargaining agent files a formal objection to the employer's proposal. If the parties reach agreement,[95] the proposal of the employer may be withdrawn, or the bargaining agent may withdraw its objection. If the parties are unable to resolve the issue during the consultation process, the Board appoints an examiner, an officer of the Board, to inquire into and report to the Board on the duties and responsibilities of the person concerned. The examiner usually tries to mediate between the parties. If he is unable to bring the parties to an agreement, he conducts a hearing in the presence of both parties and prepares a report.[96] The report simply presents facts; it does not contain conclusions or recommendations. A copy is served by the registrar on each of the parties, and they are given an opportunity to make representations about the report's accuracy or the conclusions the Board should reach in view of the report. They may do so in writing, or either party may request a hearing before the Board in connection with the report. If no representations are received within a fixed time, the Board may dispose of the matter on the basis of the material before it without further notice to the parties.

In the matter of exclusion under heads (*a*) and (*b*), the employer took the position that persons who came under these heads are excluded by operation of law, that the judgment of the employer determined the issue, that the bargaining agent had no right to object to their exclusion, and that the PSSRB had no authority to become involved in determining their status. In *Clennett*[97] the Board held that it did have jurisdiction to deal with such a situation, and its view was upheld by the Federal Court of Appeal.[98]

Where the decision must be made by the PSSRB, the issue of burden of proof comes to the fore. In the *Nunn Case*[99] the Board held that the onus of proof lies on the employer, except where the employer seeks to designate a person as a replacement for a person who has previously been designated. In the latter event the onus lies on the bargaining agent to provide positive evidence that the duties and responsibilities of the replacement are different from those discharged by his predecessor.[100] A similar onus rests on the employer where it proposes for designation a person who replaces an employee who has not been previously designated[101] or a person who has, since certification, been included in a bargaining unit.[102]

The extent of the PSSRB's authority to determine whether a person is employed in a managerial or confidential capacity (and, in the view of the Board, the effect of its determination) is narrower where the employer's proposal relates to heads (*a*) and (*b*) of the PSSRA's definition than it is in relation to the other heads. In the *Government Policy on Rights of Managers Case No. 2*, the Board said:[103]

> With regard to heads [(*a*) and (*b*)], if the claim of the employer that a person is employed in the capacities set out in those heads is challenged by the bargaining agent, the Board is limited to making a finding as to whether the person concerned is so employed. Once the Board makes such a finding, the person concerned is *ipso facto* deemed to be a person employed in a managerial or confidential capacity as of the point of time at which the person was so employed. However, where the claim of the employer is that a person is engaged in certain duties that bring him within [heads (*c*) to (*g*) of the definition] and objection thereto is made by the bargaining agent . . ., the definition says that the Board may designate such a person to be a person who performs certain described duties. It is only after the Board has made such a finding that the person is deemed to be a "person employed in a managerial or confidential capacity".
>
> This line of reasoning leads to the conclusion that the Employer cannot unilaterally treat as "designated" persons those who, it claims, are performing the duties described in heads [(*c*) to (*g*)] . . . without notice to the bargaining agent concerned and an opportunity being afforded to it to make objection to the proposed designation. If the bargaining agent objects, the *designation* cannot

> take effect until the Board has made the appropriate findings as to the nature of the duties of the person concerned. . . .

A decision of the Federal Court of Appeal raises a question concerning the effect of the words in the definition that precede heads (*c*) to (*g*). In *Public Service Alliance of Canada* v. *Public Service Staff Relations Board et al.*, Jackett C.J. said:[104]

> If these words are read in their most literal sense, a person who is or has been within any of paragraphs (*c*) to (*g*)
>
> (i) does not fall within the "excluded" class until he has been "designated" by the Employer or the [PSSRB] in such a way as to comply with the procedure contemplated by those words, and
>
> (ii) continues, once he has been so designated, to fall within the "excluded" class forever even though he has ceased in fact to fall within any of paragraphs (*c*) to (*g*).
>
> It is not necessary to decide on this application whether such arbitrary results flow from the language used. When the question arises for determination, consideration should be given, I suggest, to the question whether the language . . . is an integral part of the substantive definition or is merely a special procedure for deciding whether a person is in any of paragraphs (*c*) to (*g*), which procedure can be invoked by a bargaining agent's objection by reason of a change of circumstances even after a prior Board designation. On the latter view, the Board must make a decision, in each case where the procedure is invoked, by the application of the wording of the appropriate paragraph to the facts established before it.

The Board's authority under head (*g*) is wider than it is under the other heads of the PSSRA's definition. As the Board said in the *Economics, Sociology and Statistics Case No. 1*:[105]

> Each of the heads . . . other than head [(*g*)] deals with a situation in which there is a specific type of conflict between duty and interest. If the Board comes to the conclusion that a person proposed for designation meets the criteria set out in any of these heads, it must designate that person; it cannot enter upon an inquiry . . . whether there is or is not in fact a conflict in any particular case falling under these heads. Then there follows in head [(*g*)] an omnibus clause that applies to situations, not elsewhere identified, where a conflict *may* arise. It is only where this head is applicable that the Board has a discretion to determine whether there is such a real likelihood of conflict between a person's duties, responsibilities and interests that he should be designated as a person employed in a managerial or confidential capacity.

The consequences that flow from the conclusion of the PSSRB in the *Government Policy on Rights of Managers Case No. 2* (discussed above), which may now be open to question in view of the comments of the Federal Court of Appeal in *Public Service Alliance of Canada* v. *Public Service Staff Relations Board et al.*, were spelled out by the Board in the first-mentioned case. The Board said:[106]

> The situation is an awkward one indeed for the employer, bargaining agents and the individuals who are placed in this peculiar position. The Employer faces the dilemma of having some members of what it regards as its management team treated as members of the bargaining unit entitled to all the rights that accrue to them by reason of that fact. The individual is placed in a position where there may be a conflict between his duty to his employer and his interest in, and perhaps even his duty to, the bargaining agent. The bargaining agent may find its interests or those of its members imperilled by conduct that would be prohibited by s. 8 if the individual whose status is at the core of this discussion were a member of management.

Some further consequences are spelled out in the *Finkelman Report*:[107]

> The legislation as it stands makes it tempting for a bargaining agent to object to the claim of the employer that a certain person is employed in a managerial or confidential capacity; delay in final disposition of the issue favours the bargaining agent. Whether any of the bargaining agents has yielded to the temptation is beside the point; human nature being what it is, it is likely that this has in fact occurred on some occasions. What is far more serious from the point of view of a sound employer-employee relationship is that the employer believes that bargaining agents have objected for selfish reasons to proposals for designation in some cases. The elimination of such suspicion is highly desirable. In addition, although it is impossible to delve into the minds of Board members, there is room for suspicion that in some decisions dealing with the issue here under consideration members have been influenced to some extent by the procedural problem. A person may be exercising managerial functions at infrequent intervals; say he is replacing a managerial type when the latter is absent on vacation or because of illness. In the private sector, the replacement is treated as having a managerial status only while performing the duties of the person he replaces and is treated as an employee at other times. Because of the delay inherent in the existing system, it is not unlikely that more weight may have been given to infrequent exercise of management functions than would be the case in the administration of the general labour relations legislation.

The *Report* therefore recommended that a person to whom the employer assigned duties of a managerial or confidential nature should be treated as a member of the excluded class after two months had passed from the date that the employer notified the bargaining agent of such assignment. The delay would be abridged on consent of the bargaining agent or where a person was assigned as a replacement for a person who had previously been 'designated'. The bargaining agent would retain the right to object to the designation and to have the PSSRB rule on the objection; the ruling would have retroactive effect, as it does under the general labour-relations legislation.

Bill C-22 would have given the employer power to designate a person, in the case of persons referred to in heads (*c*) to (*f*), and the designation would have taken effect immediately on notice to the PSSRB. Designation for persons referred to in head (*g*) remained unchanged. The amendment would have preserved the right of the bargaining agent to object 'after the event', and if the Board determined that the person had not been correctly designated, the designation would have ceased to have effect from the date of the Board's determination. To protect the interests of the bargaining agent in such an event, the Bill provided that where the Board determined that a person had not been correctly designated, the employer was to pay immediately to the bargaining agent an amount equal to the dues that would have been paid by the person during the period in which he was incorrectly designated. In short, this Bill would have introduced a process akin to that which obtains under the general labour-relations legislation.

In considering the evidence adduced in any proceeding regarding designation of persons as employed in a managerial or confidential capacity, the PSSRB has regard for the duties and responsibilities of the person who is designated, not the position to which he is appointed.[108] The Board will not designate a person "solely by reason of duties contained in a job description where such duties are prospective in nature and may be performed sometime in the future. . . . The employer cannot foreordain a designation merely by preparing a job description".[109] On the other hand, if a person's duties bring him within any head of exclusion, it is not necessary, to warrant his exclusion, to show that he was performing all those duties at all times.[110] Separate employers have contended that their proposals for designation should be treated differently from proposals made by the Treasury Board. However, the PSSRB has held that the same standards ought to apply.[111]

Bargaining agents have, on occasion, resorted to section 33 of the PSSRA in an attempt to have the PSSRB review an agreed-on designation. The section provides that after the Board has determined the appropriate bargaining unit, the Board shall determine, on application of the employer or any employee organization affected, any question of whether it includes a particular employee or group of employees. The Board has held that under this section, it only has authority to decide an issue involving employees and not one involving excluded persons.[112] In *Public Service Alliance of Canada* v. *Public Service Staff Relations Board*,[113] the Federal Court of Appeal, without expressing any final view on the question, said, "the better view is that all that section 33 authorizes the Board to decide is whether an 'employee' is or is not included in a bargaining unit (not whether a person is or is not an 'employee')".

To overcome some of these problems, the bargaining agents that are members of the NJC, and the Treasury Board[114] entered into a 'De-Exclusion Agreement', endorsed by the NJC on 7 March 1979. The agreement provided that:

> 1. Where a person has been excluded from collective bargaining by agreement of the parties,
>   and
>   where, in the opinion of the Bargaining Agent, there has been a change in the duties and responsibilities of a person so excluded such that the duties of the person are no longer described in the definition in Section 2 of the PSSRA of "a person employed in a managerial or confidential capacity", the representative of the affected Bargaining Agent shall attempt to meet with an official of the department. This meeting should result in one of the following:
>   (a) agreement that the employee should be returned to the bargaining unit,
>   (b) agreement that the duties have changed but disagreement on whether the duties still warrant exclusion, or
>   (c) disagreement on whether the duties have changed.
> 2. Where the department agrees with the opinion of the Bargaining Agent, the department will consider the person as being included in the appropriate bargaining unit by the first day of the second month following notification of the change of duties.

The agreement goes on to say that where the parties disagree, the matter is to be referred ultimately to the Chairman of the PSSRB or his nominee for determination. The parties are required to abide by such determination. Where the Chairman of the PSSRB or his nominee determines that as a result of a change in duties the excluded person's duties are no longer described in the definition in section 2 of the PSSRA, the employer must consider the person as included in the appropriate bargaining unit on the first day of the second month following notification of the determination.

As of 1 September 1981, only about a dozen cases had been brought to the attention of the Secretary of the Council, and only one case had been referred for determination to the Chairman of the PSSRB.

Notes

1. The following is a partial list of Crown corporations and similar bodies that are subject to the Canada Labour Code: Atomic Energy of Canada Ltd., Air Canada, Bank of Canada, Canadian Arsenals Ltd., Canadian Broadcasting Corporation, Canadian National Railways, Canadian Overseas Telecommunications Corporation, Canadian Wheat Board, Canada Mortgage and Housing Corporation, Eldorado Nuclear Ltd., Export Development Corporation, Farm Credit Corporation, Harbour Commissioners, National Arts Centre, National Harbours Board, Northern Transportation Co. Ltd., Petro-Canada, Pilotage Authorities, Polysar Ltd., Royal Canadian Mint, St. Lawrence Seaway Authority. The new Canada Post Corporation comes under the Canada Labour Code, subject to some transitional provisions: see Canada Post Corporation Act, S.C. 1981, c. 54.
2. See below, p. 27 ff.
3. *Report of the Preparatory Committee on Collective Bargaining in the Public Service* (Ottawa: Queen's Printer, 1965) p. 28. (Hereafter referred to as *Report of the Preparatory Committee*.)
4. As amended by S.C. 1972, c. 18, s. 4.
5. As amended by S.C. 1972, c. 18, s. 4. See also Canada Labour Code, s. 109. S. 145 of the Code stipulates, among other provisions, that in the event of a transfer of a portion of the public service to the jurisdiction of the Code, application may be made to the Canada Labour Relations Board for a determination concerning certain matters, including the continuation of the existing collective agreement. Until the CLRB makes a determination concerning that agreement, the PSSRA applies. No counterpart of s. 145 of the Canada Labour Code appears in the PSSRA. In 1969 the Royal Canadian Mint, which had been listed in Part I of Schedule A (now Schedule 1) of the PSSRA, was transferred to the jurisdiction of the Canada Labour Relations Board by the Government Organization Act, S.C. 1968–69, c. 28,

s. 105. See note 1, above, respecting the Post Office, especially ss. 67–69 of the Canada Post Corporation Act.

6. See definition of the term 'employee' in s. 2 of the PSSRA and Table 5, below. See *Report of the Preparatory Committee*, p. 10, for a discussion of the situation concerning what were known as 'prevailing rate employees' before the enactment of the PSSRA.

7. *Report of the Preparatory Committee*, p. 28. For an account of the part played by one of the associations representing professional employees in the federal public service, see John Swettenham and David Kealy, *Serving the State: A History of the Professional Institute of the Public Service of Canada, 1920–1970* (Ottawa: The Professional Institute of the Public Service of Canada, 1970). See also Chapter 3, p. 102, below.

8. Note, however, that Saskatchewan had never excluded professionals of any sort from its legislation. Quebec brought professionals under its Labour Code in 1964, and in 1965 made special provision for the recognition of bargaining agents for a wide range of professionals in the Quebec civil service.

9. See statement of Dr. George Davidson, then Secretary of the Treasury Board, to the Special Joint Committee of the Senate and of the House of Commons on Employer-Employee Relations in the Public Service of Canada, 1966 *Minutes of Proceedings and Evidence* (Ottawa: Queen's Printer, 1966), p. 881. (Hereafter referred to as *Proceedings*, 1966.) Dr. Davidson also stated that ministerial staff would be excluded since, in his view, such persons probably were not members of the public service as that term was defined in the PSSRA.

   Public service collective bargaining statutes in other Canadian jurisdictions exclude some or all persons belonging to this class.

10. (1968) PSSR Reports K 172 at K 174.

11. See statement of Dr. Davidson to the Joint Committee, *Proceedings*, 1966, pp. 881–82.

12. See statement of Dr. Davidson to the Joint Committee, *Proceedings*, 1966, p. 884.

13. The PSSRB had before it a question whether revenue postmasters were persons excluded under this head in the *Revenue Postmasters Case* (1968) PSSRB file 146–2–18. The remuneration of some postmasters, where the post office was operated in conjunction with a business or in a private home, was related to a workload formula that was translated into equivalent hours per week. The Board found, however, that revenue postmasters were required by their contract to keep their offices open for service over a longer period than the time allotted to them under the workload formula. The Board held that the workload unit was a conceptual unit, and that the test under the PSSRA was the actual time they were required to be available for service.

14. In public service collective bargaining legislation, some provincial jurisdictions have followed the federal pattern. In *Re Martin* (1981) 3 N.B.R. (2d) 365, the New Brunswick Court of Appeal held that the two provisions of the New Brunswick Public Service Labour Relations Act that were identical with items (iv) and (v) of the definition of the term 'employee' quoted in the text above must be read separately. In the course of his judgment, Stratton J.A. for the Court said, "casual employment means employment at uncertain times or irregular intervals or employment lacking continuity and has reference to the nature of the employment and not to its duration. . . ."

    For a discussion of the treatment of part-time, casual and temporary employees under the Ontario Labour Relations Act, see Jeffrey Sack and M. Levinson, *Ontario Labour Relations Board Practice* (Toronto: Butterworth, 1973), pp. 69–71, 81 and 297–98. For statistics relating to part-time employees, see Table 5, below.

15. Statement of Dr. George Davidson to the Joint Committee, *Proceedings* 1966, p. 882.

16. See J. Finkelman, *Employer-Employee Relations in the Public Service of Canada: Proposals for Legislative Change* (Ottawa: Information Canada, 1974), Part I, pp. 41–48. (Hereafter referred to as the *Finkelman Report*.) See also *Employer-Employee Relations in the Public Service of Canada: Proposals for Legislative Change, Supplementary Observations and Recommendations* (Ottawa: Information Canada, 1975), pp. E–1–4. (Hereafter referred to as *Supplementary Observations*.) See also Canada, *Report to Parliament of the Special Joint Committee of the Senate and the House of Commons on Employer-Employee Relations in the Public Service*, 1976, First Session, Thirtieth Parliament 1974–75–76, for recommendations concerning treatment of casuals.

    Bill C-22, given first reading in the House of Commons on 21 March 1978, would have amended the PSSRA to define a 'casual' as "a person employed on a casual or temporary basis, unless he has been employed in the department or agency in which he is currently employed, for more than sixty working days during the preceding one hundred and eighty-day period." A news release of the Treasury Board dated 21 November 1978 stated: "Approximately 10,000 or more casual or temporary employees would become eligible to become members of bargaining units and subject to collective bargaining under the 'amended PSSRA'." The Bill was not enacted.

17. (1968) PSSR Reports K 208.

18. (1976) Yukon PSSRB file Y 42–3. The 'permanent' members of the PSSRB were appointed as the members of the Yukon Public Service Staff Relations Board.

19. Despite the fact that the "employees" of the PSSRB were excluded from application of the term 'employee' as defined in the PSSRA, the PSSRB was one of the portions of the public service specified in Part I of Schedule I of that Act as originally enacted. To demonstrate that the PSSRB was independent of the Treasury Board, it was deemed advisable to remove the name of the PSSRB from Part I of the Schedule and add it to Part II, that is, to treat the PSSRB as a separate employer (SOR/68–495).

20. See *Report of the Preparatory Committee*, 1966, p. 27. It should be noted, however, that the RCMP is named in Part I of Schedule I of the PSSRA and, accordingly, employees of the RCMP, other than those mentioned in the text, are subject to that Act. About 4000 civilian employees of the RCMP (20% of its staff) are so subject. For a discussion of employer- employee relations in those portions of the RCMP not covered by the PSSRA, see *Report of the Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure within the Royal Canadian Mounted Police* (Ottawa: Information Canada, 1976), commonly known as the *Marin Report*, and D. Forcese, "Police Unionism: Employee Management Relations in Canadian Police Forces" (hereafter referred to as "Police Unionism"), 4 *Canadian Police Forces College Journal* (1980) p. 113 ff. For recent developments see Bill C-50 and Bill C-19 (1978) and Bill C-69 (1981).

    In some provinces, provincial police forces are specifically covered by collective bargaining legislation; municipal police forces are covered in all provincial jurisdictions, in some instances by specific mention in the general labour-relations legislation, and in others by special legislation.

    See in this connection B.M. Downie and R.L. Jackson, ed., *Conflict and Cooperation in Police Labour Relations* (Proceedings of a Symposium on Canadian Police Labour Relations held at the Canadian Police College, Ottawa, Canada, 4–7 December 1978) (Ottawa: Minister of Supply and Services Canada, 1980). See also D. Forcese, "Police Unionism", p. 79 ff.

21. The Preparatory Committee expressed the same views, on the question of whether the members of the Armed Forces should be brought under collective bargaining legislation, as the Committee expressed about the RCMP. Civilian employees of the Department of National Defence are subject to the PSSRA. See also *Re Bolling et al. and the Public Service Staff Relations Board* (1978) 1 F.C. 85.

    The Canada Labour Relations Board dismissed an application for certification of a bargaining agent for the civilian employees employed in a combined retail store, groceteria and snack bar at a Canadian Forces' base in British Columbia (*Retail Clerks Union, Local 1518 and Canadian Forces Exchange System* [*CANEX*] [1978], 1

CLRBR 219), on the ground that the employees concerned were employees of Her Majesty in right of Canada. Subsequently the Governor in Council amended Part II of Schedule I of the PSSRA by adding to it the Staff of the Non-Public Funds, Canadian Forces.

Collective bargaining rights in some form have been extended to the members of the armed forces in a number of European countries: Norway, Denmark, Sweden, West Germany, Austria and the Netherlands. For a discussion of the unionization of the armed forces elsewhere, see "Pro and Con Debate on Military Unions" in *Government Employee Relations Reports*, No. 697, 28 February 1977, p. 697:30 ff., reprinted from 1 *AEI Defense Review* (1977) (Washington, D.C.: American Enterprise Institute for Public Policy Research). See also K.R. Robinson, "Labour Unions in the Armed Forces", 43 *Civil Service Review* (1970): pp. 2–16; and Edward J. Rogers, "Collective Bargaining for the Canadian Armed Forces", (unpublished M.A. thesis, Carleton University, Ottawa, 1971); *Canadian Military System for the Redress of Grievances, A Comparative Study Prepared by the Office of the Judge Advocate General*, and National Defence Act, R.S.C. 1970, c. N-4, s. 29 and s. 195 ff.

22. Members of the staffs of the Senate and of the House of Commons are governed by the Senate and House of Commons Act, R.S.C. 1970, c. S-8, and the House of Commons Act, R.S.C. 1970, c. H-9. Members of the staff of the Library of Parliament are governed by the Library of Parliament Act, R.S.C. 1970, c. L-7. In practice there is some provision for grievance procedure, including a process of adjudication, in the case of employees of the Senate and the House of Commons, but none in the case of employees of the Library of Parliament. On 3 February 1967 the Special Joint Committee of the Senate and the House of Commons on Employer-Employee Relations in the Public Service of Canada made its *Sixth Report* (Ottawa: Queen's Printer, 1967. Hereafter referred to as *Sixth Report*.) to the Senate and the House of Commons on Bill C-170, the PSSRA. The Committee recommended that consideration be given to amending the three statutes mentioned above "to extend to the employees thereunder advantages and rights similar to those provided public servants under Bill C-170" (*Sixth Report*, pp. 1312–33). No action has been taken to implement this recommendation. Private members' bills to extend collective bargaining to these groups have been introduced on a number of occasions, but have not been enacted.

The Quebec Civil Service Act, which makes civil servants subject to the Labour Code, applies to "the functionaries and employees of the Legislature".

23. See, for example, *Stevenson, Jordan and Harrison Ltd.* v. *MacDonald and Evans* (1952) 1 T.L.R. 101; and Roger W. Ridout, *Problems of Labour Law* (London: Sweet & Maxwell, 1972), p. 7.

24. (1976) PSSRB file 143–8–160.

25. (1978) 1 F.C. 346, at 354 and 353.

26. See (1979) PSSRB file 143–8–160. The dimensions of the problem as they affect the federal public service are discussed in the *Finkelman Report*, Part I, pp. 48–49 and *Supplementary Observations* pp. E 4–5. As to contracts of service of a creative or artistic nature, see now the final decision of the Board in the *National Film Board Case* (note 24, above).

    For statistics on personal service contracts see Table 6, below.

27. Although persons employed in a managerial or confidential capacity are not deemed to be employees within the meaning of the PSSRA and are thus ineligible for collective bargaining, they are entitled to resort to the grievance procedure established under the Act.

    The rights of a person employed in a managerial or confidential capacity to process grievances of certain types are discussed in Chapter II, p. 552, below. Compare s. 90 of the Ontario Labour Relations Act, which confers upon persons in managerial and confidential positions the right to present and process complaints of unfair practices. The conclusion of the Ontario Labour Relations Board in *Jarvis and Associated Medical Services, Incorporated* (1961) 61 CLLC ¶16 218, that management personnel were entitled to protection against unfair practices under the Act as it stood at that time was reversed by the Court of Appeal and by the Supreme Court of Canada, (1963) CLLC ¶15 452, and (1964) 64 CLLC ¶15 511. The position taken by the Ontario Labour Relations Board has now been given legislative endorsement.

28. Thus the Ontario Labour Relations Act, R.S.O. 1980, c. 228, subparagraph 1(1) (3) (*b*) states that "for the purposes of this Act, no person shall be deemed to be an employee . . . who, in the opinion of the Ontario Labour Relations Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations".

29. *Report of the Preparatory Committee*, 1966, p. 32.

30. For a discussion of the extent to which the PSSRB can inquire whether a conflict of interest arises in any particular case, see below, pp. 42–43 and 49–51.

31. As we shall see below (p. 46 ff.), the PSSRB becomes involved with differences between the parties on whether a person falls within any of the heads of the definition only where the bargaining agent objects to the claim of the employer that a person is excluded. It would be a task of herculean proportions to gather

and present information on the types of persons that have been 'agreed on', in the sense that no objection has been made by the bargaining agent. The discussion in the text is confined to cases in which the PSSRB has been called upon to make a decision and in which significant principles have been enunciated.

32. *Beatty* (1975) PSSRB file 173–2–184; *Wex* (1980) PSSRB file 172–2–294. See further p. 38, below, and Dr. George Davidson in his presentation to the Joint Committee, *Proceedings*, 1966, p. 891.

33. (1980) PSSRB file 172–2–296. See also *Clennett* (1979) PSSRB file 148–2–24.

34. The explanation for exclusion under head (*b*), given by Dr. George Davidson to the Joint Committee, *Proceedings*, 1966, p. 891 was that:

> ...the legal officers of the Department of Justice are called upon from time to time to provide the government, the employer, with advice and counsel in a great variety of matters that could be related to this legislation, and consequently . . . it is considered that they should be regarded as persons employed in a managerial capacity, with all that implies for their position under this legislation.

35. (1978) PSSRB file 172–2–262.

36. (1971) PSSR Reports K 745.

37. Discussed on pp. 33–35, below.

38. *Professional Institute of the Public Service of Canada* v. *Attorney General of Canada* (1972) F.C. 1316 at 1322.

A number of the provincial statutes exclude all members of the legal profession entitled to practice in the province and employed in a professional capacity.

39. See note 35, above.

40. (1980) PSSRB file 174–2–304.

41. (1973) PSSR Reports K 998.

42. *Clyde* (1977) PSSRB file 172–9–255.

43. *Lalonde* (1980) PSSRB file 172–14–297.

The Estimates (1979–80) of the Office of the Auditor General identified three program activities; one of these was "Government Audits", and the functioning of the Departmental and Corporate Group was one of the activities of the program. Lalonde headed one of twenty-two audit teams in the Group. The PSSRB found that the teams were essentially performing technical functions subsidiary to the program. The Board indicated that each case must turn on its particular facts, but expressed doubt that a government program can be identified by referring to the status of the person who is responsible for it or by making a subjective assessment of its importance.

Although the PSSRB held that Lalonde could not be designated under the head of exclusion here under discussion, it held that he should be designated under head (*g*) (discussed at p. 40 ff.)

44. See *Larivière and McQuaid* (1976) PSSRB file 172–2–178; *Tozer* (1977) PSSRB file 172–2–215; and *Cram* (1980) PSSRB file 174–2–304.

45. See note 43, above.

46. (1978) PSSRB file 172–2–215. In *Manuel* (1980) PSSRB file 173–2–321, the representative of the employer stated that he was not prepared to accept the opinion advanced in *Lalonde* that the Estimates provide a useful avenue of approach to the identification of a government program. The majority of the division of the PSSRB dealing with the application was satisfied that the application before it could be determined without review of what constitutes a 'government program'. A dissenting member did not deal with this question either. See also note 43, above.

A number of Canadian provincial jurisdictions contain similar provisions. The *Finkelman Report* (Part I, p. 35) recommended that the head of exclusion here under discussion should be amended to read "persons who regularly participate in a significant degree in the development and determination of government policies or programs". The Special Joint Committee on the *Report* recommended the wording "[a person who] effectively participates in the determination of government policies or programs, or participates in the approval of plans of organization" *(Sixth Report*, p. 47:29). Bill C-28, introduced on 8 March 1978, and Bill C-22, introduced on 21 November 1978, were designed to deal with these recommendations. Neither received second reading. The relevant provisions of these Bills will be dealt with on pp. 43 and 51, and in note 48, below.

47. *Butler* (1977) PSSRB file 172–2–268.

48. *Wing* (1977) PSSRB file 172–2–240. In *Jones* (1976) PSSRB file 175–2–165, the PSSRB held that it was not sufficient to bring a person under this head where his advice was limited to technical matters, such as the proper forms to be completed, and did not relate to the nature of the discipline to be imposed.

For recommendations concerning this head of exclusion, see the *Finkelman Report* (Part I, pp. 36–38) and the *Sixth Report* of the Parliamentary Committee on the *Finkelman Report*, p. 47:28. Bills C-28 and C-22 would have deleted reference to personnel officers and would have dealt with the situation in another fashion. (See p. 43, below.) The Bills would have excluded persons employed in the Treasury Board. A news release from the Treasury Board dated 21 November 1978 estimated that of a Treasury Board staff of 870 persons, 570 persons were excluded at that time; the Bills would have excluded the remaining 300.

Treasury Board dated 21 November 1978 estimated that of a Treasury Board staff of 870 persons, 570 persons were excluded at that time; the Bills would have excluded the remaining 300.

A number of provincial jurisdictions exclude persons who may conceivably be involved with certain aspects of the relationship between the employer and its employees.

49. (1968) PSSR Reports K 150 at K 152.

50. (1975) PSSRB file 176-2-170. In *Cassidy* (1975) PSSRB file 176-2-167, an officer at the first level of the grievance process had authorized another person to deal with complaints from employees in his section. The employer sought to have the latter person excluded, under head (*f*), as a person employed in a confidential capacity to the grievance officer. The PSSRB referred to its decision in *Townshend* and pointed out, further, that the collective agreement between the bargaining agent and the employer called for a four-level grievance process, and that the Board could not accede to the employer's request because, if it did, it would be adding a fifth level to the grievance process. From an examination of cases preceding *Townshend*, it would appear that earlier the Board had been inclined to designate persons who dealt with complaints as persons confidential to grievance officers (head [*f*]: see, for example, *Philpott* [1972] PSSRB file 173-2-115).

51. (1978) Adjudication file 169-2-266.

52. (1968) PSSR Reports K 195 at K 203 ff. See also *Bell* (1975) PSSRB file 173-2-172; *Gelhede* (1976) PSSRB file 172-2-216; and *Selman* (1976) PSSRB file 174-2-220.

53. See *Bell* (note 52, above), where, in taking *disciplinary* action, the authority of the person concerned was limited to the signing of a written reprimand, but the person did have authority to make binding decisions on other matters; *Pelletier* (1978) PSSRB file 172-2-284; *Larivière* (1976) PSSRB file 172-2-178. The Board has held that if a person has been properly authorized to deal with grievances, it is immaterial that he has not had occasion to exercise his authority or that the number of instances in which he has exercised his authority has been minimal: see *Selman* and *Pelletier*, above, and *Hughes* (1978) PSSRB file 173-2-258.

54. See Financial Administration Act, subsec. 7 (1) and Public Service Terms and Conditions of Employment Regulations, s. 106.

55. See *Bell* (note 52, above). In *Denee* (1977) PSSRB file 174-2-245, the Personnel Manual of the Department in which the person concerned was employed suggested that an officer *should* seek the

advice and assistance of the staff-relations division in dealing with grievances. The PSSRB held that since he was not *required* to seek advice, but did have responsibility to prepare his own response, whether he sought advice or not, he came within the head here under discussion. In *Pelletier* (note 53, above), the Board endorsed *Denee* and expressed the view that if a person obtains advice that he is free to reject, it cannot be said that he is in thrall to his superior.

56. Further in this connection, see note 73, below.

57. See also Chapter 12, pp. 627–28 ff., below.

58. In a 1983 decision, *Programme Administration Case* (1983) PSSRB file 174–2–361, the Board asserted that it could, and did, provide a remedy in a situation where the employer attempted to designate an excessive number of grievance officers. The Board said:

> Subsection 99(4) does not in our opinion contemplate that the employer may designate any number of employees to deal with grievances at any level by simply inserting in their respective statements of duties and responsibilities (i.e., the job description of the class of employees) the duty to respond to grievances and specifically assigning to each of them that authority. Subsection 99(4) requires the employer to designate a person for the purpose of receiving and responding to grievances of employees to ensure an effective and efficient grievance procedure and the employer has unilateral authority to decide which specific persons will perform that function. It is not intended, in our view, to give unfettered authority to the employer to assign this duty to any number of employees without regard to whether or not there is any need in the workplace for additional employees to perform the duty.

See also note 99, below. At the time of writing, an application was pending before the Federal Court of Appeal to reverse the Board's decision.

Bargaining agents have gained the impression that the employer has proposed the designation of some persons as employed in a managerial and confidential capacity in order to ensure the continued operation of a service in case of a strike. These agents believe that in so doing, the employer has attempted to circumvent the designation process provided for under subsec. 79(1). (For this process, see Chapter 10, p. 483 ff., below.)

Grievance officers are expressly excluded in a number of other jurisdictions in Canada.

59. In *Goldberg* (1980) PSSRB file 172–2–289, the Board remarked that "the employer has a duty to organize its affairs so as not to

involve employees in managerial or confidential matters on an occasional basis."

60. (1975) PSSRB file 175–2–168. See also *Lalonde* (1980) PSSRB file 172–14–297.

61. *Nunn* (1970) PSSR Reports K 547 at K 549; *Patry and Young* (1980) PSSRB file 172–2–296.

62. *Wheatley* (1970) PSSR Reports K 551 at K 552.

63. See *Wex* (1980) PSSRB file 172–2–294.

64. See *Larivière* and *McQuaid, Tozer, Cram*, in note 44, above.

65. (1971) PSSR Reports K 704.

66. (1971) PSSR Reports K 745 at K 747-K 748.

67. *The Professional Institute of the Public Service of Canada and Attorney General of Canada* (1972) F.C. 1316.

68. See, for example, *Larivière and McQuaid* and *Townshend*, notes 44 and 50 above.

69. (1978) PSSRB file 172–2–262.

70. *The Queen* v. *Public Service Staff Relations Board et al.* (1979) 2 F.C. 60 at 63.

71. (1979) PSSRB file 176–2–287. Endorsed in *Patry and Young* (1980) PSSRB file *172*–2–296; *Kettle* (1980) PSSRB file 174–2–298; and *Cram* (1980) PSSRB file 174–2–304.

72. (1953) 3 D.L.R. 641 at 648.

73. The *Finkelman Report*, Part I, p. 38, recommended that:

> ...a person engaged in confidential duties be excluded only if he is so engaged under the exclusive direction and control of a person or persons excluded under another head and that this exclusionary provision should not apply to a person in a support capacity whose confidential duties relate solely to the processing of grievances at the first level in the grievance procedure established under the Act.

The recommendation was endorsed by the Parliamentary Committee on the *Finkelman Report* (*Sixth Report*, p. 47:29). Where there is more than one level of grievance procedure, Bill C-28 and Bill C-22 would have removed from the exclusion persons who are confidential to those who deal with grievances at the initial level.

Exclusions similar to those of the PSSRA are to be found in a number of other Canadian jurisdictions.

74. (1971) PSSR Reports K 721 at K 725.

75. *Ibid.*, at K 726.

76. *Ibid.*

77. See, for example, *Stevens* (1976) PSSRB file 172–2–215; *Tozer* (1977) PSSRB file 172–2–215; *Larivière and McQuaid*, note 44 above; *Langille* (1977) PSSRB file 172–2–256; *Jones* (1978) PSSRB file 174–2–277; *Sisson* (1979) PSSRB file 176–2–287.

78. (1977) PSSRB file 174–2–250.

79. See note 77, above.

80. See, for example, *Fraser* (1975) PSSRB file 175–2–159; *Provencher* (1976) PSSRB file 175–2–159; *Bond and Lingeman* (1976) PSSRB file 172–2–219; *McLelland* (1977) PSSRB file 175–9–235; *Wing* (1977) PSSRB file 172–2–240; *Carlyle* (1977) PSSRB file 174–2–250. In the last-mentioned case the PSSRB, in rejecting a proposal for designation, noted that although the advice of the person concerned was generally accepted, he did not have the kind of decision-making authority concerning policy matters that would bring him within the ambit of the management team.

81. *Air Traffic Control Case No. 3* (1971) PSSR Reports K 704 at K 705.

82. See subsec. 26 (4) and Chapter 3, pp. 105 and 107, below. The PSSRB has never been called upon to define the term 'supervisor'. Several other jurisdictions in Canada have followed the federal model, at times using the same terms and at times excluding only persons who spend a significant part of their time on the supervision of other employees. An account of the treatment of supervisors under the general labour-relations legislation in Canada and in the United States may be of interest.

The Ontario Collective Bargaining Act, enacted in 1943, did exclude from the definition of the term 'employee' persons "acting on behalf of the employer in a supervisory . . . capacity", clause 1 (*e*) (ii). The Wartime Labour Relations Regulations, P.C. 1003, of 17 February 1944, which supplanted the Ontario Collective Bargaining Act and had application throughout the whole country, focused on certain attributes of supervision. They excluded from the definition of the term 'employee', "a person . . . having authority to employ or discharge employees", clause 2 (1) (*f*) (i). In the *Spruce Falls Power and Paper Company Case* (1947) 47 CLLC ¶16 489, the Ontario Labour Relations Board held that foremen of the company were employees within the meaning of the Regulations because their authority was limited to recommending hiring or discharge. There was evidence in the case from the personnel manager of the company that "with the growing emphasis on collective bargaining and the troubles that spring from the temperamental judgments not only of foremen but also of superintendents, both foremen and superintendents have been deprived of the power to hire and fire."

The Wartime Labour Relations Regulations were replaced in 1948 by the Industrial Relations and Disputes Investigation Act, and this statute became the pattern for the legislation adopted by most of the provinces at the time. That statute excluded from collective bargaining "a manager or superintendent, or any other person who, in the opinion of the Board, exercises managerial functions . . . ", clause 2(1)(*i*).

For some years the jurisprudence developed by the various labour-relations boards under the general labour-relations legislation brought into the bargaining community some persons who had commonly been regarded by employers as the lowest level of the managerial hierarchy, that is, working foremen in the construction and printing industries and lead hands elsewhere. Within the last decade or so, labour-relations boards went further and evolved the 'prime function' test. Thus, for example, in the *Falconbridge Nickel Case* in Ontario in 1966 (Ontario Labour Relations Board Reports, September 1966, p. 379), the OLRB distinguished between those who possess independent discretionary powers and those whose minor supervisory functions do not materially affect the employment relationship, and held that there was no reason to exclude the latter group from collective bargaining.

The Manitoba Labour Relations Act, subsec. 2(2), has embodied this principle in its legislation. The Saskatchewan Trade Union Act, paragraph 2 (*b*)(i), excludes any person whose primary responsibility is actually to exercise managerial authority and who actually performs managerial functions.

Under the Labor-Management Relations Act, 1947 in the United States, supervisors are excluded. The term 'supervisor' is defined as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment", s. 2 (11). For an account of the way in which the National Labor Relations Board of the United States had dealt with the question of supervisors before and after the enactment of the Labor-Management Relations Act, see Russell A. Smith, *Labor Law: Cases and Materials* (2d) (Indianapolis: The Bobbs-Merrill Company, 1953), pp. 66–79.

For a discussion of the situation in the United States on bargaining by supervisors in the public service, see Stephen L. Hayford and Anthony V. Sinicropi, "Bargaining Rights Status of Public Sector Supervisors" 15 *Industrial Relations — Journal of Economy & Society* (February 1976), pp. 44–61; and, by the same authors, *Collective Bargaining and the Public Sector Supervisor* PERL 54 (Chicago: The International Personnel Management Associates, 1976). See also remarks of Morris Slavney, chairman, Wisconsin Employment Relations Commission in *Governor's Conference on Public Employment Relations; A Summary of the Proceedings* (New York, 14 October 1968), p. 6; R.M. Godine, *The Labor Problem in the Public Service: A Study in Political Pluralism* (New York: Russell and Russell, 1951), pp. 101–2. For an interesting discussion of the views opposed to according collective bargaining rights to supervisors, see Harry T. Edwards, "The Impact of Private Sector Principles in the Public Sector: Bargaining Rights for Supervisors and the Duty to Bargain" in David Lipsky, ed., *Union Power and Public Policy* (Ithaca, N.Y.: New York School of Industrial and Labor Relations, Cornell University, 1975), pp. 54–64.

83. (1977) PSSRB file 174–2–250.

84. *Ibid.* See also *Jones* and *Lalonde*, in notes 77 and 60 above. In *Brooks* (1979) PSSRB file 173–2–282, the PSSRB said that the giving of an order by an operations specialist to cease a questionable practice in air-traffic control did not, by definition, generate conflict.

> It is the nature of the order (or effective recommendation) and its palpable effect on the relationship between the person who originates the order and the person who implements the order that may generate such conflict. Some orders, patently procedural, technical and administrative, do not give rise to a conflict of interest while orders of a different nature might well, of course, generate a conflict of interest situation.

The public service collective bargaining legislation of many other jurisdictions in Canada contains a catch-all clause similar to that contained in the federal legislation.

85. See the *Finkelman Report*, Part I, pp. 34–35; the *Final Report of the Royal Commission on Financial Management and Accountability* (the *Lambert Report*) (Ottawa: Minister of Supply and Services Canada, 1979), p. 26 and pp. 45–46 and 234; and the *Report of the Special Committee on the Review of Personnel Management and the Merit Principle* (Ottawa: Minister of Supply and Services Canada, 1979), pp. 5 ff. and 58. (Hereafter referred to as the *D'Avignon Report*.)

86. The Advisory Group, composed of prominent private sector executives, was set up in 1968 to provide the government with independent advice on rates of pay and conditions of employment for senior executives in the public service. The relevant reports of the Group were its *Second Report* (1971), *Sixth Report* (1978) and *Eighth Report* (1980).

87. The distribution of exclusions is not equal in the five occupational categories. See Table 7, below.

88. See above, pp. 31–33.

89. See above, p. 33 ff.

90. PSSRB, *Rules of Practice and Procedure*, ss. 29 and 30.

91. In *Public Service Alliance of Canada v. Public Service Staff Relations Board et al.* (the *Postal Management Case*) (1979) 2 F.C. 599, at 605, Jackett C.J. commented in a footnote, "*Query* whether this is a designation such as is contemplated by the definition of 'person employed in a managerial or confidential capacity'?" Again, in *Patry and Young* (1980) PSSRB file 172–2–296, the Board said that it was "imprecise to refer to the identification by the employer" of a person under head (*a*) or (*b*) "as a proposal for exclusion. There is no provision for a designation procedure and the Board therefore does not have the power to designate such persons. . . . the mere finding of fact that a person is described under paragraphs (a) or (b) is all that is required."

92. S. 34.

93. In *Ouellette et al.* (1977) PSSRB file 174–2–252, the bargaining agent contended that the employer was not entitled to propose persons for designation during the period set out in s. 51 of the Act for the continuation of terms and conditions of employment while the parties were bargaining for the renewal of a collective agreement. (See Chapter 9, p. 416 ff., below.) The Board dismissed the contention.

    In the *Government Policy on Rights of Managers Case No. 1* (1968) PSSR Reports K 216 at K 239, the PSSRB conceded that under the procedure contained in s. 2 of the Act, providing for the designation of persons employed in a managerial capacity, the employer was at a disadvantage in seeking to designate persons who are not members of a bargaining unit for which a bargaining agent was being, or had been, certified. The Board suggested that it was prepared to make available to the employer an interim procedure for such purposes. However, the employer never did avail itself of the procedure suggested.

94. In *Gestrin and Sunga* (1971) PSSR Reports K 721 at K 727, the PSSRB stated that in post-certification designations, the Board becomes part of the process only if the bargaining agent makes an objection. If no objection is made, the person becomes effectively a designated person as soon as the time for filing an objection has elapsed.

95. Where the bargaining agent agrees with the proposal of the employer on 'designation' of certain persons and notifies the PSSRB of the agreement, it cannot subsequently reverse its position and request the Board to rule on the status of the persons agreed upon. See *Ship Repair Case No. 1* (1967) PSSR Reports K 55 at K 58.

96. It is customary for the examiner to include in his report a statement that the parties were afforded a full opportunity to adduce evidence, and that they were asked at the conclusion of the examination to indicate whether they had anything further to ask or suggest. It is not the PSSRB's general policy to accept additional evidence at a Board hearing concerning managerial or confidential exclusions. Where the Board is of the opinion that additional evidence is necessary to enable it to arrive at a decision, it will usually refer the matter back to the examiner. In some special circumstances it may allow the parties to adduce viva voce evidence before it: see, for example, *Leblanc* (1978) PSSRB file 172–2–215, especially where the evidence that a party seeks to adduce could be characterized as the sort of evidence the examiner was not authorized to inquire into. Thus, in *Hughes* (1978) PSSRB file 173–2–258, the Board permitted the bargaining agent to call evidence about certain provisions of the collective agreement so that it could argue the impact of such provisions on the case then before it. The Board will also permit a party to adduce evidence to show that the examiner has not reported accurately and adequately the evidence produced before him. See Sack and Levinson, *Ontario Labour Relations Board Practice*, p. 260.

97. (1978) PSSRB file 148–2–24. The Board noted that there was no specific provision in the Act that empowered the employer to determine unilaterally whether a person falls within the scope of these heads. It said that if it were to rule otherwise, "the employer [might], with complete impunity, unilaterally exclude an employee from his bargaining unit thereby denying him the status of employee for purposes of the Act, and, accordingly, depriving him of the rights and benefits he would otherwise be entitled to under the Act."

98. *The Queen* v. *Professional Institute of the Public Service of Canada* (1980) 2 F.C. 295. For a discussion of s. 18 of the Act, see Chapter 13, p. 672 ff., below.

In *Patry and Young* (1980) PSSRB file 172–2–296, the Board said that "while it may not be necessary [in such a case] to have the kind of detailed information about duties and responsibilities and organizational structures that was sought by the bargaining agent during the examiner's enquiry" in proceedings involving other heads of 'exclusion', "enough information is needed to determine whether the 'confidential relationship' asserted by the employer is inherent in the *positions* in which the named persons are employed." In *Wex* (1980) PSSRB file 172–2–294, the Board cautioned that formal job descriptions and similar documents may be of limited value in determining whether a particular person falls within head (*a*).

99. (1970) PSSR Reports K 547 at K 549. See also *Thomson and McIndoe* (1971) PSSR Reports K 687 at K 690-K 691.

In the *Programme Administration Case* (1983) PSSRB file 174–2–361, which, at the time of writing, was under review by the Federal Court of Appeal, the Board said:

> We are of the opinion that, where the employer proposes [in a post-certification designation proceeding] a significant alteration in the management profile by the addition of [a large number of] persons to represent the employer as a step in the grievance procedure, and the bargaining agent objects thereto, there is an obligation on the employer to establish to the Board's satisfaction that there has been a change in circumstances or that there is some other material factor which would justify such a major increase. Evidence of a large increase either in the number of employees in the [area concerned] or in the number of grievances being presented might satisfy such an onus . . . as might evidence of complaints from employees that their grievances are not dealt with efficiently and expeditiously.

100. *Schwass* (1976) PSSRB file 173–2–192; and *Cram* (1980) PSSRB file 174–2–304. When it comes to the presentation of argument, the Board held in *Sisson* (1979) PSSRB file 176–2–287, that the employer should proceed first "because it is the responsibility of the employer to establish the merit of its application."

101. *Personnel Management Manual Case* (1979) PSSRB file 148–2–34.

102. *Schwass*, note 100, above.

103. (1971) PSSR Reports K 708 at K 714.

104. (1979) 2 F.C. 599 at 616.

The Chief Justice seems to have overlooked the fact that if the Board did make a determination designating a person, and if subsequently his duties and responsibilities were altered, it would be open to the bargaining agent to seek review of the earlier decision under s. 25 of the Act. Indeed, for some years, there appeared to be a tendency on the part of bargaining agents to file objections to the employer's proposals on 'designation' in all but the most obvious cases, in the hope that the Board's power under s. 25 would afford them an opportunity to challenge a proposal of the employer if a person's job content were altered.

105. (1968) PSSR Reports K 150 at K 152.

106. See note 103, above, at K 715-K 716.

107. Part I, p. 21.

108. *Air Traffic Control Case* (1980) PSSRB file 173–2–299.

109. *MacDonald* (1978) PSSRB file 172–2–262; *MacFarlane* (1977) PSSRB file 172–9–238. Where the Board has denied a proposal for designation in the circumstances discussed in the text, it has often added a comment that a further application may be made at

an appropriate time, with respect to the person concerned, when he has begun to discharge the requisite duties. Compare *Doctoroff* (1977) PSSRB file 172–2–239, where, on agreement of the parties, prospective duties were taken into account.

In *Fleming* (1980) PSSRB file 172–2–319, the employer sought to designate a person under heads (*c*) or (*g*) at a stage when he had had little time to perform the duties of his position before going on full-time language training in which he was still engaged when the examination was conducted. The Board rejected the employer's proposal because the precise nature of his duties and responsibilities following his return from language training remained a matter of conjecture, although it was recognized that his input would be greatly increased at that time. In this case, the Board distinguished *Gibson* (1977) PSSRB file 147–2–12, where it held that a temporary interruption in the performance of duties by a designated person while he was in attendance on language training did not terminate his exclusionary status.

110. *Doctoroff*, note 109, above.

111. See *Clyde* (1977) PSSRB file 179–2–255; *Taylor* (1977) PSSRB file 175–9–257; *McLelland* (1977) PSSRB file 175–9–235.

112. *Postal Management Case* (1978) PSSRB files 147–2–15, 148–2–23; and *Gibson* (1977) PSSRB file 147–2–12.

113. (1979) 2 F.C. 599 at 615.

114. For a discussion of the organization and role of the National Joint Council, see Chapter 5, p. 221, ff., below.

3: *Establishing the Bilateral Relationship*

Who Should Represent the Parties?

The introduction of a system of collective bargaining implies that the determination of some or all terms and conditions of employment will thenceforth be fixed, not by unilateral decision of the employer, but by a form of bilateral decision-making process. As a consequence, "If some form of . . . direct negotiations is to be contemplated, a first question must be: who negotiates with whom? In private labour relations the issue is clear cut. Representatives of management meet with the representatives of the unions. Each of the sides represented can make authoritative and binding commitments through their representatives; the relationship between them is truly bilateral."[1] Although this statement is a generalization that may call for some qualification, nevertheless, in a broad general sense it does convey the accepted principle of bargaining in the private sector. The essential criteria for effective bilateral staff relations were usually lacking when collective bargaining legislation or programs were about to be introduced in the federal public service.

Identifying the Effective Employer

The state of affairs in the federal area at the relevant time is well described in the *Report of the Preparatory Committee on Collective Bargaining in the Public Service*.[2] The Preparatory Committee noted that employees in the public service are employed in over a hundred departments and agencies throughout the country, that some of these agencies are partially or completely independent, and that conditions of employment are determined by a complex array of different statutory provisions and administrative arrangements. Consequently the Committee concluded that the problem was not so much one of ascertaining who the employer was — that could have been done quite simply by designating the Crown as the employer as, of course, it was traditionally and legally at common law; the problem was rather one of identifying the focus of authority in which would be vested the jurisdiction to represent the employer for collective bargaining purposes. At the same time, the 'vested interests' of the Civil Service Commission and the Treasury Board, as well as those of deputy heads and chief executive officers of departments and agencies, had to be taken into account.

The approach to the problem recommended by the Preparatory Committee was to:

> ...divide agencies (other than the Crown corporations subject to the provisions of the Industrial Relations and Disputes Investigation Act) into two groups:
>
> (1) those subject to Government direction and control that may be appropriately treated as part of the "central administration" in matters affecting rates of pay and conditions of employment; and
>
> (2) those subject in some degree to Government direction and control but having (by reason of statutory provision or administrative practice) or requiring (because of the nature of their function) a significant measure of independence in matters affecting rates of pay and conditions of employment.
>
> The Preparatory Committee eventually concluded that, for the purposes of the Public Service system of collective bargaining . . ., all agencies in the first of these groups should be treated as parts of a single employer for which the Treasury Board would be recognized as the spokesman, and that each agency in the second group should be treated as a separate employer. Agencies granted "separate employer" status could have their own bargaining units and would have the capacity to enter into and administer their own collective agreements. However, their status in the collective bargaining system would in no way alter their relationship to the Government.

> . . .
>
> The recommendation that the Treasury Board be recognized as the agent of the employer in the "central administration" may give rise to some uncertainty about the role of departmental management in the proposed system. As visualized by the Preparatory Committee, the arrival of collective bargaining will call in an unmistakable way for a recognition on all sides of the essential unity of management, for a new emphasis on a coordinated approach to the problems of staff relations and personnel administration generally. Departmental managers will be expected to pick up and carry some heavy responsibilities. Among other things, they will be expected to serve in an advisory capacity to officers of the Treasury Board responsible for the negotiation of collective agreements and, in the areas over which they have jurisdiction, to play the managerial role in the implementation and administration of collective agreements and arbitral awards and the processing of employee grievances.[3]

The recommendations of the Preparatory Committee were adopted and incorporated into the Public Service Staff Relations Act (PSSRA). Her Majesty in right of Canada was declared to be the employer; she would be represented, for those parts of the public service that have been referred to as the 'central administration', by the Treasury Board[4] and, for other parts of the public service, by the agencies defined in the PSSRA as 'separate employers'.[5]

Section 54 of the PSSRA authorizes the Treasury Board to "enter into a collective agreement with the bargaining agent for a bargaining unit, other than a bargaining unit comprised of employees of a separate employer, applicable to employees in that bargaining unit,"[6] according to whatever manner may be provided for by any rules or procedures it determines on the basis of section 3 of the Financial Administration Act. That Act was amended to vest in the Treasury Board a wide range of managerial functions. These are set out in subsection 7 (1), which provides, in part, that it is the function of the Treasury Board to determine manpower and training requirements, to provide for the classification of positions and employees, to determine rates of pay and conditions of employment, such as hours of work, travel allowances and safety standards, and to establish standards of discipline and applicable penalties. In addition the Treasury Board is to:

> (*i*) provide for such other matters, including terms and conditions of employment not otherwise specifically provided for in this subsection, as [it] considers necessary for effective personnel management in the public service.

However, the authority of the Treasury Board to make rules or procedures with regard to the matters mentioned above is subject to the provisions of subsection 7(6) of the Financial Administration Act, which declares that:

> The powers and functions of the Treasury Board in relation to any of the matters specified in subsection (1) do not extend to any such matter that is expressly determined, fixed, provided for, regulated or established by any Act otherwise than by the conferring of powers or functions in relation thereto on any authority or person specified in such Act. . . .

Subsection 3(4) of the same Act provides that "Subject to this Act and any directions of the Governor in Council, the Treasury Board may determine its own rules and procedures." However, no detailed rules or procedures have been set down to authorize the Treasury Board to enter into a collective agreement. The practice that has evolved is to obtain a Treasury Board minute after a settlement has been reached following the completion of negotiations. The minute authorizes named persons[7] to enter into a collective agreement that may result from the settlement; after the collective agreement has been ratified by the bargaining agent, a copy is attached to the minute.

The concern expressed by the Preparatory Committee about departmental managers was met by subsection 7(2) of the Financial Administration Act:

> The Treasury Board may authorize the deputy head of a department or the chief executive officer of any portion of the public service to exercise and perform, in such manner and subject to such terms and conditions as the Treasury Board directs, any of the powers and functions of the Treasury Board in relation to personnel management in the public service and may, from time to time as it sees fit, revise or rescind and reinstate the authority so granted.[8]

Some of the management functions formerly discharged by the Civil Service Commission were excluded from collective bargaining and retained by the Commission, now renamed the 'Public Service Commission'. As we shall see, several provisions preserve the powers of the Commission.[9]

Subsection 7(3) of the Financial Administration Act deals with the status of separate employers under that Act.

> The Governor in Council may, in respect of any portion of the public service that is a separate employer, authorize the responsible Minister of the Crown, his deputy or the chief executive officer

> thereof to exercise and perform, in such manner and subject to such terms and conditions as the Governor in Council directs, any of the powers and functions of the Governor in Council or the Treasury Board in relation to personnel management in that portion of the public service and may, from time to time as he sees fit, revise or rescind and reinstate the authority so granted.

The separate employers, without exception, carry out their own negotiations, but do so, in effect, in the shadow of the Treasury Board.[10] By section 55 of the PSSRA, a separate employer requires the approval of the Governor in Council to empower it to enter into a collective agreement.

The Representation of the Employees

Type of Representative Organization

Who is to speak for the employees at the bargaining table? In many European jurisdictions, an organization of employees speaks for its own members, and there may be several organizations representing employees who work side by side in one enterprise.[11] In Canada and in the United States, labour-relations legislation embodies the principle that an organization qualifying under the applicable law to represent employees in a constituency known as 'an appropriate bargaining unit' has the exclusive right to represent all employees in that unit, whether or not they are members of that organization.[12] The Preparatory Committee on Collective Bargaining in the Public Service did not address itself in its *Report* to the question of whether exclusivity would or would not be advantageous to the system it recommended. A proposed draft statute attached to the *Report* as an appendix adopts the exclusivity principle,[13] and this principle was incorporated in subsection 40(1) of the PSSRA.[14] However, as a concession to existing organizations or professional organizations that might not seek or acquire bargaining rights, subsection 9(2) of the Act provided that persons employed in a managerial or confidential capacity would not be regarded as offending against the 'unfair practice' provision of the legislation concerning discrimination if they received representations or held discussions with the representatives of any employee organization.[15]

In all labour-relations legislation in Canada enacted over the last quarter of a century or more, power to engage in collective bargaining on behalf of employees has been entrusted to organizations of employees, and the legislation almost invariably lays down certain conditions that an organization must satisfy to qualify as the body entitled to bargain on behalf of a group of employees. In section 2 of the PSSRA, the term applied to such a body is 'employee organization',[16] and the term is defined to mean "any organization of employees the purposes of which *include* the regulation of relations between the employer and its employees for the purposes of this Act".[17] The use of the word 'include' in the definition must be taken to imply that an employee organization may qualify as such under the Act, even if it has purposes other than the regulation of relations between the employer and its employees. Subsection 40(1) of the PSSRA provides that when an employee organization is certified as a bargaining agent for a bargaining unit, it acquires the exclusive right to bargain on behalf of the employees in the bargaining unit and to bind them by a collective agreement. By the same provision, such an organization acquires the same right to represent employees in presenting or referring to adjudication grievances relating to the interpretation or application of a collective agreement or an arbitral award. In the *Windsor and District Branch of the Customs and Excise Union Strike Declaration Case*, the PSSRB said: "These purposes at least must be comprehended within the purposes referred to in" the definition of the term 'employee organization' in the Act.[18] In this case a component of the Public Service Alliance of Canada (PSAC) was held not to be an employee organization because, under its by-laws, it could not bargain on behalf of employees and bind them by a collective agreement. On the other hand, in the *Hospital Services Case No. 1*,[19] the PSSRB held that the fact that the PSAC had provided in its constitution that it could delegate its responsibility to negotiate a collective agreement to a component (that is, a branch) of the Alliance, and that a component could process grievances for members in the department concerned, but had reserved to itself the authority to sign "all contracts", did not derogate from its authority and capacity as a bargaining agent. The Board found that the Alliance was an employee organization within the meaning of the PSSRA.

The qualification in the definition of the term 'employee organization' that speaks of purposes of the organization including "the regulation of relations between the employer and its employees for the purposes of this Act" came before the

PSSRB for consideration in the *Ships Crews Case, No. 1.*[20] The 'objects' clause in the constitution of the Canadian Brotherhood of Railway, Transport and General Workers, one of the organizations involved in that case, declared in general terms that one purpose of the organization was to establish, through collective bargaining, high wage standards and improvement of employees' working conditions. The finding of the Board was as follows:

> In our view, the phrase "the purposes of this Act" in [the definition section] . . . was designed to make it clear that the organizations of employees that were to be treated as employee organizations within the meaning of the definition were to be those whose purpose was to engage in collective bargaining among other activities. If the definition were construed literally and the construction carried to its logical conclusion, the only organizations that could meet the test would be those that were established after the Public Service Staff Relations Act came into force. A reading of the Act, and particularly Schedule A [the schedule setting the timetable for commencement of bargaining under the Act] and section 72 (2), makes it evident that it was the intention of Parliament that the collective bargaining process was to be instituted with a minimum of delay, a state of affairs that it would be impossible to attain if the only organizations that could be certified were those that came into being after the effective date of the statute.[21]

One of the issues that has had to be faced in legislation providing for collective bargaining by public servants is whether the membership of the organization that represents the employees should be confined to public servants. Canadian jurisdictions have accepted as a fact of life in their general labour legislation that international unions and national unions and their locals or branches may legitimately represent Canadian employees in collective bargaining. When we come to public service legislation, concern has been expressed that a governmental institution involved in bargaining might become subject to policies established elsewhere that have no relation to the needs and interests of that institution or of the citizens of Canada. This concern relates, not only to international unions and locals of international unions, but also to organizations that include, or are largely composed of, members in the private sector.[22]

There is no provision in the PSSRA that expressly bars the acquisition of collective bargaining rights for public servants by an organization that includes as members persons who are not federal public servants.[23] However, since the term 'employee' is defined in the Act as "a person employed in the Public Service", the question has arisen whether an organization that includes persons not employed in the public service could qualify as an employee organization within the meaning of the Act. In the *Ships Crews Case, No. 1*, [24] where an application for certification was filed by the Canadian Brotherhood of Railway, Transport and General Workers, a national trade union, the PSSRB held that the Act's definition of the term 'employee organization' was broad enough to encompass such organizations. In its decision, considering concerns expressed, the Board uttered a caution. It stated that if any evidence was presented to it that showed that collective bargaining by an organization was subject to the dictates of persons who were not members of the public service, the Board would consider revoking any certificate that might have been issued to the organization. The Board also noted that Parliament always has the power to amend the legislation in appropriate fashion to take care of any untoward condition that might become evident in the future.

Similar cautions were expressed in the *Printing Operations Case, No. 1*,[25] where the applicant was a council of international unions, and in the *Ship Repair Case, No. 2*,[26] where the applicant was a council of locals of international unions. In the first of these cases, the attention of the PSSRB was drawn to the fact that the constitution of some of the members of the applicant council of employee organizations contained "a requirement that certain provisions shall or shall not be inserted into collective agreements entered by the subordinate bodies [that is, locals]; in other constitutions, approval of the proposals for collective bargaining or of the terms of a collective agreement must be obtained from the international officers." In dealing with this matter, the Board said:

> In considering the meaning and implications of the provisions of union constitutions, it must be borne in mind that collective bargaining under legislation has developed empirically. Union constitutions were adopted in most cases long before any legislation governing the collective bargaining process came to be enacted and such legislation as was passed differed from jurisdiction to jurisdiction. Unions have had to adapt their practices to the law despite the provisions of their constitutions. It was given in evidence before us that, notwithstanding the language used in some of the constitutions of the international unions affected by this application, the officers of these unions have not insisted on the strict application of the letter of the law to situations such as

> those with which we are here concerned. . . . the fact is that all five internationals, with knowledge of the provisions of the Public Service Staff Relations Act, as the preamble to the resolutions approving the formation of the Council of Graphic Arts Unions of the Public Service of Canada [the applicant in this case] shows, did approve the formation of such a Council and granted to it authority to act for them in matters of collective bargaining, under a constitution of the Council that calls for the agreement to be ratified "by a majority of those voting from the Public Service membership of each union". By this action, they must be taken to have waived any claim they might otherwise assert to any degree of control over the actions of the Council that would not be consonant with the Act.[27]

Another objection to the status of organizations that did not have their main roots in the public service was raised in the *Printing Operations Case No. 1*[28] by an opposing employee organization which objected that the applicant was not "qualified by knowledge, experience or organization, to represent the particular and peculiar interests of the public service employee in a collective bargaining relationship with his employer". No evidence was presented to the PSSRB to support this objection, but the Board, thinking that it ought to express its views on this point, said:

> The selection of a bargaining agent, so long as the entity is an employee organization within the meaning of this Act and meets the other requirements of the Act, is exclusively a matter for the employees concerned. Beyond that, it is not within the jurisdiction of this Board to assess the suitability of any employee organization to represent employees. Where the democratic process operates, the choice as to who is to govern a body of men rests with the "electors" and they have to abide by the consequences of the selection they make. In the absence of explicit statutory authority to the contrary, no body of "wise men" has or ought to have a power of veto over the result because some members of the constituency are of opinion that the electors have made an improper choice.

An aspect of the concern that an employee organization may be manipulated by external influences or that its policies may be affected by considerations external to the employer-employee relationship involves the question whether an employee organization representing employees in the public service for collective bargaining purposes should be permitted to have an association with a political party. Public service legislation in many jurisdictions, including the federal Public Service Employment Act,[29] contains prohibitions against political partisanship by public employees. Under the PSSRA (subsection 39([2]), the PSSRB is forbidden to certify a bargaining agent for a bargaining unit where the employee organization concerned:

> (*a*) receives from any of its members who are employees,
> (*b*) handles or pays in its own name on behalf of members who are employees, or
> (*c*) requires as a condition of membership therein the payment by any of its members of,
>
> any money for activities carried on by or on behalf of any political party.

If a certified bargaining agent subsequently fails to observe these prohibitions, its bargaining rights may be terminated under subsection 42(2) of the same Act.[30]

The PSSRB was not called upon to deal with these prohibitions until 1981, when the status of a composite local of a union that supported a certain political party was questioned. The decision of the Board in that case was as follows:

> The Applicant acknowledges that it does receive from some of its members, who are not employees in the Public Service, monies on behalf of a political party. This is done on a strictly voluntary basis and is not a requirement or a condition of membership in the Applicant. However, the Applicant, through a letter from its counsel, has given an undertaking that it will not receive or handle money for activities carried on by or on behalf of any political party from an "employee" as defined in section 2 of the [PSSRA]. Accordingly, on the basis of the above undertaking, the Board finds that the Applicant does not fall within the prohibitions contained in subsection 39(2) of the Act.[31]

The Canadian Labour Congress, with which a number of the employee organizations in the federal public service are affiliated, has acknowledged the special relationship between public servants and their employers in connection with political activities. At a meeting of its Executive Council on 20 August 1958, it affirmed:

> (a) the right of any affiliated union, national, international, regional or provincial, to exercise complete autonomy within the constitution and by-laws of the Congress;
> (b) more specifically, the right of any affiliated union of government employees to be free, financially or otherwise, from any responsibility for or identification with any Congress policy pertaining to political matters;

> (c) recognition of the fact that political neutrality is essential in the government service, whether federal, provincial or municipal. . . .

The generally accepted principle for labour-relations legislation, both in Canada and in the United States, is that an organization that is to represent employees in collective bargaining must be freely chosen by the employees themselves and free from interference by the employer or any one in management. This principle is usually given statutory effect in two ways: first, by forbidding the employer or anyone in management to participate in the creation or operation of the employee organization or to interfere with the employees' freedom to choose the organization they wish to represent them. This prohibition is often accompanied by a statutory declaration that employees have the right or are free to join the organization of their choice. Secondly the labour-relations board may be directed to deny certification to an organization that is dominated or influenced by the employer. Both of these methods have been incorporated in the PSSRA. The first is dealt with in the 'unfair practice' part of the Act (that is, sections 6, 8 and 9), which will be discussed in Chapter 12, below.

Concerning the second method, the PSSRA directs as follows:

> 39. (1) The [PSSRB] shall not certify as bargaining agent for a bargaining unit, any employee organization in the formation or administration of which there has been or is, in the opinion of the Board, participation by the employer or any person acting on behalf of the employer of such a nature as to impair its fitness to represent the interests of employees in the bargaining unit.
>
> . . .
>
> 42. (2) Where the Board, upon application to it by the employer or any employee, determines that a bargaining agent would not, if it were an employee organization applying for certification, be certified by the Board by reason of a prohibition contained in section 39, the Board shall revoke the certification of the bargaining agent.

Employer interference with the free choice of a bargaining agent is a frequent cause of litigation before labour-relations boards administering labour-relations legislation in other jurisdictions.[32] Charges of employer interference have arisen before such boards in certification proceedings relating to local government institutions. Under the PSSRA, the issue arose in only one case, and that in the very early days of the legislation's history. In the *Hospital Services Case No. 1*,[33] on an application by the Public Service Alliance of Canada for certification as bargaining agent for employees in the hospital services group in the operational category, the *Confédération des syndicats nationaux et le syndicat des fonctionnaires fédéraux* (CSN) intervened to oppose the application on the ground that "the applicant is not fit to represent the interests of the employees in the proposed bargaining unit, in view of the participation of the employer and of persons acting on his behalf in the establishment and management of the applicant". At the hearing of the application, counsel for the intervener abandoned this ground of objection. The PSSRB found that:

> No evidence was presented to the Board that tended to show that the Alliance was an employee organization in the formation or administration of which there has been or is participation by the Employer or any persons acting on behalf of the Employer of such a nature as to impair its fitness to represent the interests of the employees in the bargaining unit.

Another restriction on an organization's entitlement to be certified as a bargaining agent that has been included in a number of statutes prohibits the organization from discriminating against any employee because of certain personal qualities or characteristics. Thus subsection 39 (3) of the PSSRA declares that "the Board shall not certify as bargaining agent for a bargaining unit, any employee organization that discriminates against any employee because of sex, race, national origin, colour or religion." Subsection 42 (2) then goes on to declare that if an organization that has been certified does discriminate on the bases just mentioned, its certificate may be revoked.[34]

A few statutes deny certification to an organization on grounds other than those already dealt with. Thus the Yukon Schools Ordinance expressly instructs the Yukon Teachers Labour Relations Board not to certify an organization that "denies membership in the organization to any employee or class of employees in a bargaining unit by virtue of a policy or practice that the employee organization applies relating to qualification for membership in the organization."[35] Although no other jurisdiction in Canada has included a similar provision in its legislation (and there is none in the federal legislation), the PSSRB has expressed the opinion that it would reject an organization's application for certification if the organization did not admit to membership any employee who would be included in a bargaining unit that the Board found appropriate for collective bargaining.[36]

In the *Printing Operations Case No. 1*,[37] it was argued that the constitution of one of the organizations involved, which called for approval of an application for membership by an executive committee or by the general membership of the union "left open a possibility for discrimination against employees in the Public Service by the non-public service members of these unions." In dealing with this argument, the Board said:

> The fact is that there is no evidence before us that there had ever been discrimination practised against employees in the Public Service by any of the unions composing the Council. If, at any time in the future, it were to be shown to the Board that the unions concerned were engaging in discriminatory practices, it is our conviction . . . that a remedy would be available under the terms of the legislation as it stands. If such a remedy were to prove unavailing or inadequate, . . . 'Parliament always has the sovereign power to amend the legislation in appropriate fashion to take care of any untoward condition that may become evident in the future'.[38]

In the *Graphic Arts Case*[39] an applicant asked for a determination, under section 48 of the PSSRA, of whether a successor council of employee organizations acquired the rights, privileges and duties of its predecessor. An objection was raised by an employee in the bargaining unit concerned that one of the constituent organizations of the council had two classes of membership: full membership and provisional membership. The monthly fee for provisional members was substantially lower than the fee for full members, whose higher fee entitled them to pension and mortuary benefits as well as access to a strike-pay fund. The majority of public servants who belonged to the organization were provisional members. Provisional members did not have the right under by-laws of the organization to vote in the election of members of the bargaining team. However, provisional members were invited to make submissions concerning items to be included in the bargaining proposals, and terms of settlement were submitted to a ratification vote of all members of the organization, including provisional members. Provisional members were entitled to cast ballots for one member of the executive of the organization and had served as members of the negotiating committee. Provisional members could also vote on all matters of interest to them. The Board held that the limited rights accorded to provisional members did not disqualify the organization from being treated as an employee organization entitled to be certified. In the *Electronics Case No. 1*,[40] the constitution of the applicant provided that to be eligible for membership in the union, a person might be required to pass an examination demonstrating his qualification in the craft to which the union pertained. The international representative of the parent organization of the applicant local union testified that this requirement was treated by the union as applicable to the construction industry, and he undertook that the article of the constitution concerning an examination would not be applied to the local union. The Board held that considering the evidence, the provision of the constitution referred to was not a bar to certification. However, the Board went on to state that if this article of the constitution were applied contrary to the undertaking, the matter could be brought to the attention of the Board for such action as it might deem necessary in the circumstances.

The general labour-relations legislation in Canada has taken account of the fact that on occasion, two or more trade unions might wish to seek joint certification as bargaining agent for a single unit.[41] The PSSRA has adopted the same principle. However, it formulated the rules for certifying a council of employee organizations with closer attention to detail than was paid under the general labour-relations legislation at the time. Subsection 28 (2) of the Act reads as follows:

> The Board may certify a council of employee organizations as bargaining agent for a bargaining unit where the Board is satisfied that
>
> (*a*) the requirements for certification established by this Act are met; and
>
> (*b*) each of the employee organizations forming the council has vested appropriate authority in the council to enable it to discharge the duties and responsibilities of a bargaining agent.

Method of Acquiring Bargaining Rights

The prevailing pattern in the general labour-relations legislation in Canada for determining which organization is to represent any class or classes of employees in collective bargaining is through certification by a board or tribunal that a particular organization is the bargaining agent for a specified class, or specified classes, of employees. Some statutes permit an employer to accord voluntary recognition to an employee organization, without the requirement for certification.

Certification is the sole process specified in the PSSRA[42] for the acquisition of bargaining rights; by this means the employer (the government) thus relieves itself of any possible charge that it might be showing favouritism if it recognized one employee organization rather than another.

Timeliness of Application for Certification

The PSSRA deals indirectly with the question of timeliness. Section 27 of the Act declares that an employee organization seeking to be certified may make an application, subject to a provision barring this step during certain periods while a collective agreement or arbitral award is in force. The PSSRA provides in section 30:

> (1) Where a collective agreement or an arbitral award is in force and is for a term of not more than two years, an employee organization may apply to the Board for certification as bargaining agent for any of the employees in the bargaining unit to which the agreement or award applies only after the commencement of the last two months of its operation.
>
> (2) Where a collective agreement or an arbitral award is in force and is for a term of more than two years, an employee organization may apply to the Board for certification as bargaining agent for any of the employees in the bargaining unit to which the agreement or award applies only
>
> (*a*) after the commencement of the twenty-third month of its operation and before the commencement of the twenty-fifth month of its operation;
>
> (*b*) during the two-month period immediately preceding the end of each year that the agreement or award continues to operate after the second year of its operation; or
>
> (*c*) after the commencement of the last two months of its operation.
>
> (3) Where a collective agreement referred to in subsection (1) or (2) provides that it will continue to operate after the term specified therein for a further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the collective agreement, an employee organization may apply to the Board for certification as bargaining agent for any of the employees in the bargaining unit to whom the collective agreement applies at any time permitted by subsection (1) or (2), as the case may be, or during the two-month period immediately preceding the end of each year that the collective agreement continues to operate after the term specified therein.

In short, there is a 'closed season' on raids by a rival organization during the lifetime of a collective agreement that does not exceed two years, and there are periodic 'open seasons' thereafter in case of a longer-term agreement. In the *Library Science Case*[43] the parties had entered into a collective agreement that was to run until 8 February 1976. The agreement contained a 're-opener' clause providing for amendment on mutual consent. Before the expiration date of the agreement, the parties amended the agreement by revising the rates-of-pay provisions; they also amended the duration clause to extend the agreement until 8 August 1976. An application for certification made by a rival organization was timely under the original agreement, but counsel for the incumbent contended that it was untimely by reason of the amended agreement. The PSSRB rejected the contention, saying that any other construction of the relevant provisions of the PSSRA would enable the employer and an incumbent bargaining agent to eliminate any 'open season'.

Section 31 of the Act expressly bars a further application by an unsuccessful applicant for a certain period of time:

> Where an application for certification of an employee organization as bargaining agent for a proposed bargaining unit has been refused by the Board, the Board shall not certify the employee organization as bargaining agent for the same or substantially the same proposed bargaining unit until at least six months have elapsed from the day on which the Board last refused such certification, unless the Board is satisfied that the previous application was refused by reason only of a technical error or omission made in connection therewith.

During the initial certification period, employee organizations at times found it difficult to ascertain the number of employees in the unit for which they were seeking certification. In the *Fisheries Research Board Case No. 1*[44] an applicant that had acted in good faith and relied on misleading information from an employer source, quickly requested leave to withdraw its application after it became aware of the facts. The PSSRB held that during the early stages of the initial certification period, where it was satisfied of the applicant's good faith and prompt attempt to rectify its error, the Board should grant the applicant leave to withdraw rather than treat the application as having been refused.

The Certification Process

On an application for certification under the PSSRA, the applicant must establish that:

- It is an employee organization within the meaning of the Act.[45]
- It does not fall within any of the disqualifications that would prohibit the PSSRB's certifying the applicant.[46]
- The persons representing the organization in the making of the application have been duly authorized to perform this act.
- The group of employees whom the applicant is seeking to represent constitutes a unit appropriate for collective bargaining in accordance with the provisions of the PSSRA.[47]
- A majority of the employees in the unit wish the applicant to represent them as their bargaining agent.

For many years the Board held an open, somewhat formal, hearing on an application for certification. The parties were required to attend and present evidence concerning the various issues, with witnesses subject to cross-examination. Recently, in a number of instances, certification applications have been disposed of without a hearing on the written consent of the parties.[48]

On the first application for certification by an employee organization, the organization is required to submit proof that at the time it makes its application, it has the status of an employee organization within the meaning of the PSSRA. A defect in the constitution or by-laws of an organization that exists at the time the application is made and that would be fatal to its entitlement to certification cannot be corrected by a resolution adopted by the organization after it has made its application.[49] In support of its claim to status, an employee organization is required to file a copy of its constitution or articles of association and to call witnesses to testify concerning the circumstances in which it came into existence and to state that it is not an organization whose certification is prohibited by the Act. Once the PSSRB has made a finding that a particular organization meets the requirements set out in the Act, it has been the practice to state, at the outset of the hearing of a subsequent certification proceeding to which that organization is a party, that the Board has previously made a finding concerning its status, and that the same finding would apply in the current case unless an opposing party seeks to question the organization's status. No challenge of this sort has so far been made.

Under sections 28 and 29 of the PSSRA, an application for certification may also be made by a council of two or more employee organizations, and such a council is deemed to be an employee organization for the purposes of the Act. Since such a council must consist of employee organizations, it must establish that each of its component organizations is itself an employee organization within the meaning of the Act. It must also establish that the component organizations have duly authorized the establishment of a council. As the PSSRB said in the *Postal Operations Case No. 1*:[50]

> A council of employee organizations is not a loosely knit collectivity of sovereign employee organizations. The organizations composing a council transfer to it a good deal of authority and the council, once certified as a bargaining agent, acquires rights and becomes subject to responsibilities under the [PSSRA]. It is, therefore, essential that the council establish to the satisfaction of the Board that the constitutional instrument which creates the council has been adopted with the approval of the members of component organizations that make up the council.

However, the Board went on to say that such approval did not have to be provided for in the *constitution* of each of the component organizations; as a general rule, concurrence in the setting up of a council "may be shown by an appropriate provision in the constitution of an employee organization adopted at a properly called convention or by referendum in accordance with the constitutional requirements of an employee organization or by the adoption of an appropriate resolution by the members of the employee organization concerned."

As to the requirement for the vesting of "appropriate authority in the council to enable it to discharge the duties and responsibilities of a bargaining agent," the Board is given authority by paragraph 19 (1) (*k*) of the Act to make regulations of general application respecting what constitutes such appropriate authority. Although the Board has not made regulations of this nature, it did issue Policy Statement No. 2 on 14 April 1969, in which it said:[51]

> The Board is of the opinion that, on an application for certification by a council of employee organizations, the council should provide to the Board the following material:

> (*a*) a resolution or by-law of each employee organization constituting the council indicating that the organization has approved the formation of a council of employee organizations;
>
> (*b*) a constitution of the council adopted with the concurrence of each of the employee organizations forming the council, which should include the following provisions:
>
> (ii) a provision vesting in the council authority to apply for certification as a council and to negotiate, execute and administer a collective agreement;
>
> (ii) a provision for the election or appointment of the officers of the council; and
>
> (iii) a provision spelling out the manner in which a collective agreement is to be ratified, i.e., whether a ratification is to be by vote of an over-all majority of the employees in the bargaining unit or by vote of a majority of the employee organizations constituting the council.
>
> So far as the Board can see at present, there would appear to be nothing to prevent a council from delegating to each of its constituent organizations authority to process grievances on behalf of the council, so long as the constituent organization acts on behalf of the council and so indicates on any grievance form or adjudication form.[52]

The PSSRB has had before it seven applications for certification of a council of employee organizations. In the first of these, *Postal Operations Case No. 1*,[53] the Board held that the Canadian Union of Postal Workers, one of the employee organizations concerned, had not properly vested in the council the requisite authority, and the Board dismissed the application. The Council of Postal Unions was subsequently reorganized and was certified.[54] The following year, the Council of Postal Unions was certified for a unit of part-time employees.[55] In 1974 the Council of Postal Unions was dissolved, the certification of the council was revoked,[56] and subsequently the two organizations that had constituted the council, the Letter Carriers Union of Canada and the Canadian Union of Postal Workers, were each certified as bargaining agent for a unit comprising part of the postal operations occupational group. In the *Printing Operations Case No. 1*,[57] the Board found that a number of international unions had properly constituted themselves a council of employee organizations. In the *Ship Repair Case No. 2*,[58] a similar finding was made about a council of 'locals' of a number of international unions. This council consisted of locals of international unions, some of which were situated on Canada's east coast and some on the west coast. Subsequently the council was dissolved, and two new councils were constituted, one comprising locals on the east coast and the other comprising locals on the west coast. Each of the councils was certified as bargaining agent for an appropriate unit.[59]

One of the conditions for certification set out in paragraph 34 (*d*) of the PSSRA is that the PSSRB must be satisfied "that the persons representing the employee organization in the making of the application have been duly authorized to make the application". At the end of the form prescribed by the PSSRB's *Regulations and Rules of Procedure* for a certification application, there is a statutory declaration that the persons signing the application have been duly authorized to make the application. In the *Hospital Services Case No. 1*,[60] the Board said:

> Where an application is properly executed and attested by the duly elected officers of an employee organization which is authorized by its constitution to make such an application and no evidence is introduced by any party opposed in interest to show that they lack such authority, it is our opinion that the statement as to due authorization contained in the statutory declaration verifying the application should be accepted at face value.

When one comes to consider how the wishes of a majority of the employees in the bargaining unit that the PSSRB finds appropriate are to be determined, a number of questions call for consideration:

- As of what date is an application for certification deemed to have been made?
- As of what date is the 'population' of the bargaining unit to be ascertained?
- As of what date is evidence of the wishes of the employees to be considered as established?
- What type of evidence is to be considered indication of what the employees wish?
- Are there circumstances that create a need for corroborative evidence of the wishes of the employees?

The PSSRB's *Regulations and Rules of Procedure*, section 3, provide that:

> ...a document shall be deemed to be filed with the registrar . . . at the time it is
> (a) sent by registered mail addressed to the registrar . . .; or
> (b) received by or on behalf of the registrar . . ., if it was not sent by registered mail.

This provision, of course, applies to an application for certification.[61]

The PSSRA, in paragraph 19(1) (*i*), empowers the PSSRB to make regulations of general application respecting:

> ...the determination of the form in which, and the time as of which, evidence
>
> (i) as to membership of employees in an employee organization . . .
>
> shall be presented to the Board upon an application for certification . . . and the circumstances in which evidence as to membership of employees in an employee organization may be received by the Board as evidence that such employees wish that employee organization to represent them as their bargaining agent. . . .

Regulations made by the PSSRB on the basis of this provision require an application for certification to "be accompanied by the documentary evidence upon which the applicant intends to rely in whole or in part to satisfy the Board that a majority of employees in the bargaining unit wish the applicant to represent them as their bargaining agent."[62] In the case of a council of employee organizations, section 29 of the PSSRA provides that "membership in any employee organization that is part of a council of employee organizations shall . . . be deemed to be membership in the council."

In a Policy Statement issued shortly after the Board was constituted, the Board said:

> In view of the problems that flow from the size and structure of bargaining units in that portion of the Public Service for which the Treasury Board is the employer and in order to minimize the delays caused by the need to record changes in and out of occupational groups and changes in employee organization membership reported by several pay offices,[63] the Board is of opinion that the date for determining the number of employees in a bargaining unit and for identifying the employees who comprise the bargaining unit should be the last day of the month immediately preceding the month in which an application for certification is filed. . . . The same governing date would be used to determine whether a majority of the employees in that bargaining unit wish the employee organization to represent them as their bargaining agent. . . . The same course would be followed in connection with applications for certification affecting employees of separate employers.[64]

In a preface to the Policy Statement, the Board commented that the purpose of the Statement was to indicate the Board's thinking at that time in order to offer a guide-line to the parties in the presentation of their cases. However, the Board added the caveat that it would be prepared to entertain submissions that the guide-lines were not appropriate to the circumstances of any particular case. The guide-lines served well in the vast majority of cases, and there was need to depart from them only in rare instances.[65]

On the issue of what constitutes proof of the wishes of the employees in a certification proceeding, the PSSRB came to the following conclusion in the *Printing Operations Case No. 1*:

> We come now to the question as to whether on the evidence the Board is satisfied that a majority of the employees in the bargaining unit wish the Council to represent them as their bargaining agent. . . . It should be noted that the relevant clause speaks of the wish of the employees in the bargaining unit to be represented by an employee organization; it does not, in express terms, make certification conditional on the desire of the employees being evidenced by membership in the employee organization concerned. There is a reference to membership in connection with certification proceedings in sections 35 and 29. The former section vests in the Board authority to "examine . . . such evidence as is submitted to it respecting membership of the employees in the proposed bargaining unit in the employee organization seeking certification", and the latter declares, in part, that "membership in any employee organization that is part of a council of employee organizations shall for the same purposes be deemed to be membership in the council". In construing the several provisions of the Public Service Staff Relations Act in this connection, it is not without significance that the Industrial Relations and Disputes Investigation Act, in dealing with the right of a trade union to be certified under that Act, uses the words "if the Board is satisfied that the majority of the employees in the unit are *members in good standing* of that trade union. . . ."[66] In view of the difference in the wording of the relevant sections of the two statutes, it is a fair inference that Parliament intended that the standard to be applied by this Board under the Public Service Staff Relations Act in determining the wishes of the majority of the employees in the matter of collective bargaining was to be less stringent than that applied by the Canada Labour Relations Board under the Industrial Relations and Disputes Investigation Act in determining whether a trade union is to be certified.[67]

The Board accepted as credible proof of the wishes of the employees:

- Evidence that certain persons were members in good standing according to the constitutions of the several trade unions that comprised a council

- Evidence that certain employees had signed membership application cards which, at the time the application for certification was made, had not been finally processed according to the constitutions of the several unions
- Evidence that some employees had applied for, or had been given, 'provisional' membership, that is, a type of membership available only during the organizational stage, on the understanding that the provisional member would be advanced to full membership when the organizational work at the establishment was completed.[68]

The Board held that the applications for membership made under all these circumstances constituted adequate proof of the wishes of the employees.

In the administration of the general labour-relations legislation in Canada, it is the common practice for proof of membership in an applicant organization to be submitted in the form of applications for membership accompanied by receipts for payment of a fixed minimum sum on account of membership dues. In view of an arrangement for the voluntary check-off of membership dues for various staff associations arrived at by the National Joint Council in 1953,[69] the PSSRB, in the Policy Statement referred to earlier, said:[70]

> ...the Board proposes to accept as proof of membership in an employee organization, during the initial certification period, any of the following:
>
> (i) a notation on the employer's list of employees in a proposed bargaining unit, filed with the Board in connection with a certification application, indicating that dues deductions are being made from the pay of an employee in favour of the organization;[71]
>
> (ii) the employee organization's copy of a payroll authorization form signed by an employee that has been deposited with the pay office, but with respect to which no payroll deduction has been made as of the date when the certification application was filed with the Board;
>
> (iii) an application for membership in the employee organization signed by the employee;
>
> (iv) a statement by an employee that he is a member of an employee organization which is certified correct by an officer of an employee organization.

The monetary requirement fixed by the Policy Statement was the payment of a minimum of one dollar within the six-month period ending on the first day of the month immediately preceding the calendar month in which the application for certification was filed.[72]

What principles has the PSSRB evolved to determine whether it is satisfied that a *majority* of the employees in a bargaining unit wish to be represented by a particular employee organization? The Board may make its decision solely on the basis of what is generally referred to as a 'membership count', that is, a cross-check of credible membership evidence against names on the list of employees furnished by the employer;[73] the list is subject to scrutiny by the employee organization. Alternatively the Board may, at its sole discretion, direct that a representation vote be taken among the employees in the bargaining unit.[74] In the *Engineering and Land Survey Case No. 2*, the Board enunciated its policy regarding the circumstances in which it would exercise its discretion on this point:

> Since, in the ordinary course of events, there is a turnover in the personnel of any occupational group, it is highly probable that the list of employees determined as of the operative date fixed according to the announced policy would not necessarily represent the true state of affairs in that regard as of the date of the making of the application. By the same token, it is obvious that any count of the membership of an applicant in a bargaining unit the personnel of which was ascertained as of the operative date fixed in accordance with the policy . . . would also lack precision. Having regard to these considerations, the Board came to the conclusion that, where the membership percentage was marginally above 50%, it could not in all conscience come to the conclusion that it was satisfied that a majority of the employees wished to be represented by an employee organization on a card count alone and that it should, in the exercise of its discretion, seek the confirmatory evidence of a representation vote. In a number of cases, the Board has directed that a representation vote should be held where the applicant's percentage of membership was less than 52%. Indeed, in a recent case, the Board held that it should direct the taking of a representation vote where the membership position of an applicant in a very small unit was in excess of 53%. We are of opinion that we should follow a similar practice where the membership position of an applicant falls somewhat below 50%. . . . In the circumstances of the instant case and having regard also to the fact that there was at least a 3% margin of error in the nominal list of employees that was filed by the Employer — an error that was brought to our attention by the Applicant with the limited resources that are available to it in checking the accuracy of the list — we believe that the Applicant has established a *prima facie* case which entitles it to have the views of the employees tested by a representation vote. . . .[75]

In the *Social Sciences and Humanities Research Council Case*,[76] the membership position of the applicant was slightly above the marginal level that would technically have entitled it to certification without a representation vote. However, evidence was adduced to show that an employee, engaged in his first organizing campaign, under the impression that a representation vote was always conducted on a certification application, had informed some employees that the signing of membership cards was intended to show an interest, but that there would be a representation vote. The PSSRB found that the employee might inadvertently have misled some employees to the point of affecting their decision to sign an application for membership. The Board held that this possibility, along with the membership position of the organization, demanded that any misgivings on the question of valid representation should be laid to rest by a representation vote.

Except in displacement situations, the PSSRB has not specifically set the lower limit of the marginal area where a vote would be directed. The Board has directed such a vote in several instances where more than 46 per cent of the employees were members,[77] but has refused to direct a vote where membership in the employee organization concerned was slightly over 40 per cent.[78] In an *Education Case*[79] the Board said that "in an application for certification . . . where the applicant is seeking to 'displace' an incumbent . . . the applicant must submit evidence of membership . . . for more than 50% of the employees in the bargaining unit . . . in order for the Board to direct the taking of a representation vote between the applicant and the incumbent."

A representation vote may also be called for in circumstances other than marginal membership situations. The PSSRB's *Regulations and Rules of Procedure*[80] provide that when an application for certification is filed, the Board may (and it invariably does) require the employer to post notices of the application[81] in conspicuous places, where they are most likely to come to the attention of the employees affected by the application, and to keep them posted till a 'terminal' date fixed by the registrar.[82] Any employee affected by an application may file with the registrar, before the terminal date, a written statement setting out concisely the material facts underlying any opposition he has to the application. Each employee who files such a statement is entitled to receive notice of the hearing of the application, and he may appear at the hearing in person or through a representative. Any employee organization opposed in interest to the applicant may file an intervention and is then entitled to receive notice of hearing and to appear at the hearing. Where the number of employees who filed statements of opposition and who were members of the applicant organization was sufficiently large to create doubt whether a majority of the employees in the bargaining unit wished the applicant employee organization to represent them, the doubt was left to be resolved by a representation vote.[83] However, after making due allowance for such statements, where the applicant still had a clear majority, it was certified without a vote.[84]

In a number of instances, the PSSRB had before it evidence that some employees in the bargaining unit held membership, not only in the applicant employee organization, but also in an intervening employee organization. The question therefore arose whether this sort of duality of membership casts sufficient doubt on the wishes of the employees to require the confirmatory evidence of a representation vote. When each of the competing organizations seeks certification and has the support of a majority of members in the bargaining unit, or when the membership of one or both falls below a majority, but is nevertheless in the marginal area, a representation vote is always in order to determine which of the organizations is to be certified.[85] However, what if one of the competing organizations does not have the requisite number of members to entitle it to a representation vote? Or what if the competing organization has not applied for certification, but proposes that a vote be directed because some of the employees are members of both organizations? In the *Printing Operations Case No. 1*,[86] the Board held that "dual membership, standing by itself, is not to be taken as casting sufficient doubt on the desire of the employees to require the confirmatory evidence of a representation vote." The Board will always direct that a vote be taken, even if an applicant has a clear majority, where the applicant is seeking to displace another organization that is the incumbent bargaining agent.[87]

Where the PSSRB directs that a representation vote be taken, it has authority, under subsection 35 (2) of the PSSRA, to

> (*a*) determine the employees that are eligible to vote; and
> (*b*) make such arrangements and give such directions as to it appear requisite for the proper conduct of the representation vote including the preparation of ballots, the method of casting and counting ballots and the custody and sealing of ballot boxes.

The date for determining the eligibility of voters in a representation vote has invariably been fixed by agreement of the parties to the proceeding, subject to the condition that such a date is not to be earlier than the date on which the PSSRB has issued the direction that a vote be taken. Employees who have 'entered' the bargaining unit after that date, and those who have voluntarily left the unit before the date on which the vote is taken, are not entitled to vote. Where an applicant seeks to displace an incumbent bargaining agent, a difference may arise between the two competing organizations, or between one or other of the organizations and the employer, concerning the persons who have been designated in the past, or those who may be designated in the course of the certification proceeding, as persons employed in a managerial or confidential capacity. The policy that the Board has adopted in such situations is that:

> ...those persons who, as of the date of [the direction for the taking of the vote], have been designated, either by agreement of the employer and the [incumbent bargaining agent] or by determination of the Board, as persons employed in a managerial or confidential capacity are not eligible to cast ballots. . . . all of those persons who the Employer alleges, are employed in a managerial or confidential capacity but who were not so designated, either on agreement of the Employer and the [incumbent bargaining agent] or by determination of the Board as of the foregoing date, are eligible to cast ballots.[88]

From time to time complaints of misconduct in election campaigns have been brought to the attention of boards administering the 'private' sector legislation. Rules have been laid down to ensure the secrecy of balloting and to eliminate practices that may improperly influence employees in their freedom of choice, and a considerable jurisprudence has evolved defining what constitutes misconduct and what remedies are available where misconduct is established.[89]

Allegations of misconduct in connection with a vote in the federal public service have been rare. In one instance of such an allegation, *Fisheries Research Board Case No. 5*,[90] the alleged 'misconduct' consisted of an officer of an employee organization exhorting employees, during the voting period, to mark their ballots against the organization named on the ballot. The PSSRB held that the officer's action did not constitute ground for nullifying the vote, stating:

> In some jurisdictions in Canada, a direction for the taking of a representation vote is coupled with a prohibition against elec-

> tioneering or propaganda during a fixed period immediately prior to the date of the taking of the vote and while the balloting is in progress. It is feasible to impose such a prohibition where what might be called a direct vote is conducted at a designated place or places and during a space of at most two or three days. No such prohibition has been imposed in any vote conducted under the Public Service Staff Relations Act.[91] It would be a practical impossibility to police a mail vote conducted over a period of some four weeks or more to see if a "no propaganda" direction has been observed. Indeed, if we were to attempt to do so, few votes would pass unchallenged by an unsuccessful party in the hope that it might reap an advantage from bringing to the Board's attention instances of minor significance. . . . We wish to make it clear, however, that the freedom to campaign does not extend to improper pressure being exercised by a representative of any employee organization, whether it be an applicant seeking the support of the employees or an opposing employee organization seeking to defeat an applicant, or for that matter by anyone acting on behalf of management.[92]

The PSSRA does not specify whether the result of a vote should be determined on the basis of a majority of eligible voters or on that of a majority of votes cast. On a representation vote in the *Northern Canada Power Commission Case No. 1*,[93] a majority of the ballots cast were marked in favour of the applicant employee organization, but the number so marked fell below a majority of those eligible to vote. The PSSRB held that it was free to apply either the 'plurality' rule or the 'majority of eligibles' rule; nevertheless, since, at the time, the relevant provisions of the PSSRA and the Canada Labour Code were identical, and since the Canada Labour Relations Board had adopted the 'majority of eligibles' rule, the PSSRB ought to adopt the same policy.[94]

Changes in the population of a bargaining unit are not likely to induce the PSSRB to review and alter a decision certifying a particular employee organization except in exceptional circumstances. In this connection the Board said in *National Research Council Case No. 3*:[95]

> ...there is the general principle of public policy that there should be an end to litigation. . . . in the industrial relations context, . . . the population of a bargaining unit is in a constant state of flux. Employees are continually being promoted and transferred and new appointments are continually being made. The "size" of a bargaining unit may be changing continually as the "business" of an employer expands or contracts. . . . If the door were opened to review by the Board of a decision on every occasion where it was

> established that some change of the sort just indicated had taken place, there would be no stability in collective bargaining. It was to meet [situations] of this sort that Parliament declared that a bargaining agent should be protected against having its right to represent the employees in a bargaining unit questioned except during specified "open seasons". . . . as a general rule, the principles . . . should not be set at naught and circumvented by an application for review. . . .

In this case the Board did hold that exceptional circumstances existed in that a large number of employees whose tasks had not been changed were reclassified. The Board stated,[96] "There was such a substantial alteration in the population of the bargaining unit that the Board cannot conscientiously find that, had the reclassified employees been included in the bargaining unit at the time material to the original decision . . ., it would have made the finding that it did as to the wishes of the employees."

Determination of Appropriate Bargaining Unit

The freedom of an employee to join a particular organization of his own choice may have little material significance for him unless that organization can acquire the right to engage in collective bargaining on his behalf. Its capacity to do so will depend in large measure on a determination of what constitutes the constituency, that is, the bargaining unit, in which he is included. *The Report of the Task Force on Labour Relations* (the *Woods Report*) observes that:[97]

> The determination of the bargaining unit . . . can be a crucial decision to collective bargaining, because the size and composition of the bargaining unit, the effective constituency of collective bargaining, determine to a significant extent the capacity of the employees for being organized into unions; and hence the likelihood of organization, the potential bargaining power of the union and the point of balance it creates with the power of the employer, and the potential effectiveness of collective bargaining for dealing with different issues; and hence the substantive matters that are covered in a collective agreement.

In the general labour-relations legislation in Canada, responsibility and authority for determining what is the appropriate bargaining unit in any particular case are entrusted to the labour-relations boards, and the legislation usually, although not invariably, vests in the boards an unfettered discretion concerning how the unit is to be composed.[98] As far as the private sector was concerned, some sort of pattern of bargaining units had generally been established before legislation was introduced, and the board charged with the responsibility of administering the legislation could rely on this pattern to a greater or lesser extent. At the time when special legislation was introduced to deal with public services, there was no such established pattern. In addition, since governments play a dual role — that of governments as well as that of employers of the employees concerned — they have a more direct interest in determining how the bargaining units are to be structured.

There are two fundamentally different approaches to the question of the type or types of bargaining units that should be established in the public service. On the one hand, there are arguments to be made for a multiple-unit approach that emphasizes the criterion of community of interest among the population of a unit, especially in the case of the crafts and professions. Those who advocate this course stress the fact that apart from other advantages, it is the only way that the principle of freedom of choice can be assured to all government employees. If the other course were taken and composite units were established, the craftsmen and professionals would find themselves in a minority, and their special interests and needs might be subordinated to the wishes of the majority. On the other hand, the proliferation of units that would likely flow from the adoption of a broad community-of-interest approach might make it difficult to administer a collective bargaining system with any degree of efficiency.

> Serious morale problems would inevitably arise, if employees working side by side within the same department of government, but being members of different bargaining units, found themselves subject to significantly different conditions of employment. . . .
>
> Under a system of multiple bargaining units, any real hope of maintaining standard service-wide conditions of employment would disappear as the various employee organizations engaged in tactical manoeuvres against one another as part of their bargaining strategy. . . . The likelihood of costly and damaging disputes is obviously greater under such circumstances.[99]

Another factor had to be taken into account in laying down the ground rules for determining the appropriateness of bargaining units. If the tribunal established to administer the legislation were left to exercise its discretion much as it saw fit, as it was under the general labour-relations legislation, the result would be infinite delays in sorting out the multifarious claims that might be made by interested employee organizations. The difficulties that would be encountered by the tribunal were apparent to the Preparatory Committee.[100]

> At an early stage in its work, the Committee became concerned with the problems with which the Public Service Staff Relations Board could be faced in dealing with the definition of bargaining units in that part of the Public Service referred to here as the "central administration". The history and existing pattern of employee representation was such as to make it inevitable that bargaining units based on a variety of conflicting principles would be proposed by organizations seeking certification as bargaining agents. The existing classification system, lacking order and a clear-cut set of underlying principles, would be of little or no help. The sheer size and organizational complexity of the Service would add its own complications. In the absence of statutory guide-lines, the Board could find itself faced with a prolonged period of controversy and litigation. And the result could be a patch-work of bargaining units offering little hope of a stable and productive set of relationships and serving in the long run to introduce serious inequities in rates of pay and conditions of employment.

Governments have therefore regarded it as essential that they should adopt a definite course of action at the outset. They should either determine, in the legislation itself or by regulation, what should constitute appropriate bargaining units or they should provide some fairly clear guide-lines for the parties and for the board charged with the administration of the legislation. If they took either action, the collective bargaining system could bear fruit speedily, especially since the government would have demonstrated by the very fact of enacting legislation that it was committed to collective bargaining as the preferred process for dealing with employer-employee relations. Nevertheless, in taking such action, government leaves itself open to the accusation that the principles concerning bargaining units incorporated in the legislation tend to favour one organization over another and, to use the words of the Task Force quoted above, to affect "the potential effectiveness of collective bargaining for dealing with different issues".

The Preparatory Committee on Collective Bargaining in the federal public service of Canada came to the conclusion[101] that:

> ...in the interests of an orderly introduction of collective bargaining and a satisfactory set of continuing relationships, the legislation governing the proposed system should require the Public

> Service Staff Relations Board to establish initially, for the "central administration", bargaining unit boundaries consistent with the occupational groups on which the new system of classification and pay is being based. In the view of the Committee, bargaining units of this kind would make good sense. Among other things, they would assist the parties to relate rates of pay and conditions of employment in the Service to those prevailing outside, and would tend to ensure a concern for equitable relativities within the Service.

Under the PSSRA, the PSSRB was given authority to determine the relevant group of employees that constitutes a unit appropriate for collective bargaining, but was instructed to do so in accordance with certain guide-lines set out in section 32 of the Act. As the Committee had recommended, the guide-lines were designed, in part, to ensure that there was some coincidence between the group of employees to which a pay plan[102] or set of working conditions applied and the group of employees for which a particular organization was certified to speak. They were also designed to pave the way for the orderly introduction of a collective bargaining regime by avoiding the inevitable arguments that would ensue if conflicting organizations were free to urge upon the Board a variety of principles governing how bargaining units were to be constituted.

The formula incorporated in section 2 of the PSSRA was based on occupational categories and occupational groups. Five occupational categories were specifically identified in the Act: scientific and professional, technical, administrative and foreign service, administrative support, operational.[103] The PSSRB was given authority to determine any other occupationally related category of employees as an additional occupational category, a power that it has not so far been called upon to exercise.[104] Subsections 26 (1) and (2) of the Act went on to direct the Public Service Commission to "specify and define the several occupational groups within each occupational category . . . in such manner as to comprise therein all employees in the Public Service in respect of whom Her Majesty as represented by the Treasury Board is the employer". The several occupational groups were to be specified and defined "on the basis of the grouping of positions and employees, according to the duties and responsibilities thereof, under a program of classification revision" that had been undertaken by the Civil Service Commission prior to the coming into force of the legislation. The description of seventy-two occupational groups so defined and specified was published in the *Canada Gazette*, and the employee organizations were thus put on notice of the perimeters within which they could carry on their organizational activities if they wished to be certified.[105]

There is nothing in the PSSRA that sets out the perimeters of each of the occupational categories identified in that Act. At the suggestion of the Chairman of the PSSRB, the Public Service Commission, when it published its specification and definition of the occupational groups as defined in subsections 26 (1) and (2) of the Act, also published the yardstick it had applied in delimiting the categories. Although an argument could perhaps be made that the Board is not bound by the *category* definitions of the Commission, nevertheless it has followed them in practice and, except for a few oblique remarks by counsel in one or two representation cases, they have not been questioned in proceedings before the Board.

> The task of reclassifying the employees in the Public Service as envisaged by the Committee was a formidable one and had to be completed, or be well under way, before collective bargaining could be introduced. The Committee sought and obtained approval in principle by the government of its classification and pay proposals in August 1964 and the Civil Service Commission, at the request of the Government, embarked on a program designed to develop and install a new system founded on the proposals. The Bureau of Classification Revision, the branch of the Commission responsible for the program, provisionally defined six occupational categories and 67 occupational groups. . . .
>
> One of the categories provisionally defined by the Bureau of Classification Revision was the executive category. There is no mention of an executive category anywhere in the Public Service Staff Relations Act. Nevertheless, the executive category does exist in the classification plan for the Public Service of Canada and a substantial number of positions in the Public Service are classified as falling into the executive category. At one time, the secretariat of the Treasury Board . . . took the position that, if a public servant occupied a position that was classified as being in the executive category, that public servant was excluded from the collective bargaining provisions of the Act. Had this position been upheld by the Public Service Staff Relations Board, it would have meant that the employer could unilaterally, by virtue of its authority to classify positions, exclude employees from the protection and advantages of the collective bargaining provisions of the Act. The Board rejected the argument and held that a public servant, even though his position was classified as being in the executive category, could be so excluded only if the employer established that the person was one who was employed in a managerial or confidential capacity.[106]

Two cases have come before the PSSRB in which the question arose whether new occupational groups could be established. In the first of these, the *Education Support Case*:[107]

> ...it came to light that there was one small group of employees that did not quite fit in to any of the occupational groups that had been specified and defined at the outset. The positions occupied by these employees were classified by the competent authority as being in the education support group in the technical category. One of the employee organizations applied for certification on behalf of the employees in this group. Because [the PSSRB] entertained some doubts as to [its] jurisdiction in the matter and as to the course [it] should follow, [it] took the precaution of having the Registrar of the Board notify all employee organizations that had been certified as bargaining agents for any employees in the Public Service prior to the date when this application was made of the particulars concerning the application and invite them to make representations to the Board concerning the application if they wished to do so. None of them availed themselves of the opportunity. Thereupon, with the consent of the employer and the applicant employee organization, the Board determined that the employees in the education support group in the technical category constituted an appropriate bargaining unit. . . .

It would appear that the same result could have been attained by treating the employees concerned as a segment of one of the specified occupational groups and determining that they constituted a separate unit under the 'escape-hatch' principle discussed below.

In the second case, the *Postal Management Case*,[108] a bargaining agent challenged the authority of the employer to establish a new occupational group. The employer had deleted certain positions from the 'programme-administration' group and reclassified them as coming within a new occupational group designated by the employer as the 'postal management' group. The employer contended that it had the right to establish a new occupational group under the provisions of paragraph 7(1)(*c*) of the Financial Administration Act, which gave to the Treasury Board authority to provide for the classification of positions and employees. The PSSRB held that authority to classify positions is granted exclusively to the employer by section 7 of the PSSRA. However, it held further that while the employer's authority under subsection 7(1) of the Financial Administration Act could be relied on to classify positions within an occupational group specified by the Commission in 1967, the employer exceeded its authority in purporting to establish a new occupational group.

The applications of the bargaining agent were dismissed on other grounds, and both parties applied to the Federal Court of Appeal, seeking to have certain portions of the Board's decision set aside. In *Public Service Alliance of Canada* v. *Public Service Staff Relations Board and the Queen as represented by the Treasury Board*,[109] the Court held that the finding of the Board that the employer had exceeded its authority should be set aside on the ground that the Board lacked authority under section 18 of the PSSRA, under which the bargaining agent had sought a remedy, to make a purely declaratory decision. On the question of whether the employer did have the right to establish a new occupational group, Jackett C.J., after examining the applicable legislation, commented:[110]

> The question that arises from all this, as it strikes me, is whether the definition of occupational groups by the Commission in 1967 has frozen the classification of the employees in the Public Service into such groups until Parliament makes some changes therein; or whether, while that definition governs for the purpose of section 26 (4) [of the PSSRA] and for the purpose of any use of a group name in a certification of a bargaining agent or other use made of it before the group has been changed, Treasury Board, in the exercise of its classification powers, can change the occupational groups of employees in the Public Service from time to time, as, in its judgment, circumstances dictate such changes. Indeed, it is not too clear whether groupings under the *P.S.S.R.A.* for purposes of collective bargaining limit in any way the exercise of Treasury Board's classification powers for organizational purposes.

During a period described in the PSSRA as the 'initial certification period', a staggered phasing-in period that was to last for about two years,[111] the PSSRB was directed, in subsection 26 (4) of the Act, that in respect of employees of whom Her Majesty as represented by the Treasury Board was the employer, that is, employees in the central administration, it could determine a unit to be appropriate if it comprised:

> (a) all of the employees in an occupational group;
> (b) all of the employees in an occupational group other than employees whose duties include the supervision of other employees in that occupational group; or
> (c) all of the employees in an occupational group whose duties include the supervision of other employees in that occupational group.[112]

No such restriction applied to applications respecting employees of separate employers. However, even in the case of Treasury

Board employees, an 'escape hatch' was provided. The limitation set out above was not to apply where it was demonstrated to the satisfaction of the PSSRB that a bargaining unit as prescribed in the limitation would not permit satisfactory representation of the employees it included. In such an event the PSSRB could proceed under the general authority vested in it by subsection 26 (5) to determine what constituted an appropriate unit. The reason for the introduction of the 'escape hatch', stemmed from:[113]

> ...a state of affairs that had arisen before the Canada Labour Relations Board, the labour relations board that has jurisdiction in the private sector in federal industries. Applications had been made to that Board by affiliates of the Confederation of National Trade Unions, a trade union federation whose base was primarily in the Province of Quebec, to sever employees located in the Province of Quebec from existing Canada-wide units. Linguistic and cultural problems characteristic of the employees in the Province of Quebec were said to have led to insufficient communications between the leadership of the incumbent bargaining agents and the employees concerned in the Province of Quebec and resulted in inadequate service being rendered by the bargaining agents to these employees. The applications were rejected for reasons that do not concern us here. The rejection generated a good deal of ill will and was one of the causes that led to the resignation from the Canada Labour Relations Board of one of the employee members of that Board who had been appointed as representative of the interest of the C.N.T.U. Legislation was introduced in the House of Commons by a private member from Quebec to amend the Industrial Relations and Disputes Investigation Act to encourage the Canada Labour Relations Board to certify regional as well as national bargaining units.
>
> It was while this controversy was going on that the Public Service Staff Relations Act came before Parliament. Needless to say, the C.N.T.U. could not endorse legislation relating to the Public Service that ran counter to what it was seeking to achieve for the private sector through an amendment of the legislation applicable to that sector. Passage of the Public Service Staff Relations Act was held up for some time while discussions were carried on to see whether the views of the C.N.T.U. could be accommodated. These discussions culminated in an *in camera* session of the Joint Committee considering the legislation. There is no record of that session, but the following day an amendment to the legislation [consisting of the escape hatch] was introduced in the Committee.

Now that the initial certification period has come to an end, the PSSRB's discretion is still subject to certain limitations.

Subsection 32 (3) of the PSSRA provides that the Board cannot include in one unit employees in more than one occupational category. Under subsection 32 (2) it also has to "take into account, having regard to the proper functioning of this Act, the duties and classfication of the employees in the proposed bargaining unit in relation to any plan of classification as it may apply to the employees in the proposed bargaining unit." These limitations also applied to instances where resort could be made, during the initial certification period, to the 'escape hatch' mentioned above. They also apply to the determination of bargaining units of employees of the separate employers.

In determining the appropriateness of bargaining units during the initial certification period, the legislation appeared to pose two problems for the PSSRB: how to deal with supervisors and how to deal with the 'escape-hatch' provision. As far as the first problem is concerned, the Board, in fact, encountered little difficulty. The term 'supervisor' is not defined in the PSSRA, and no guidance was provided for the Board regarding where the line between supervisors and the persons they supervise is to be drawn.[114] However, with two exceptions,[115] the parties agreed in proceedings before the Board both on the question of whether supervisors should or should not be included in the same bargaining unit as the employees they supervised and, where there was to be a separate unit of supervisors, on the question of which employees were to comprise the supervisory unit. With one exception, supervisors' units were determined only in occupational groups in the operational category; in bargaining units of employees in occupational groups in other categories, supervisors and those under their supervision have been included in the same bargaining unit.[116]

Let us turn now to the second problem, that of the 'escape hatch'. In applying the 'escape-hatch' provision, the PSSRB held that the onus of showing that a service-wide unit would not permit satisfactory representation of the employees it included lay on the organization making the allegation. In discharging the burden of proof, the objecting organization had to go beyond showing that a bargaining unit other than one established according to the statutory guide-lines, that is, a service-wide unit, would be just as appropriate as one determined in accordance with that formula. It had to establish conclusively that a service-wide unit would not, in the words of the statute, "permit satisfactory representation of the employees included therein".[117]

> In some instances, the argument advanced was that a craft union enjoyed certain craft privileges under the general labour relations legislation and ought to have the same privileges in the Public Service. This argument did not find favour with the Board. In other instances, the argument was that the segment of the group on whose behalf an intervening organization was claiming "unsatisfactory representation" . . . constituted only a small part of the occupational group and the employees in the segment feared that their claim to special treatment might be subordinated to the interest of the majority in the group. The conclusion of the Board was that, if it were to proceed on the principle that the fears of any minority group that its interests might conceivably be overlooked constituted adequate proof of "unsatisfactory representation", the general formula of the Act, that units should be determined on a service-wide basis, would cease to have any practical value.[118]

There were only two instances in which the 'escape-hatch' provision was applied during the initial certification period:

> On [an] . . . application for certification by the Council of Postal Unions, the non-supervisory employees in that occupational group were split into three units — employees classified as railway mail clerks, part-time postal employees, and the remainder of the non-supervisory employees in the postal operations occupational group. The rationale for this determination was that, because of the past history of the Canadian Union of Postal Workers, one of the constitutent members of the Council of Postal Unions that made the application for certification, the railway mail clerks and the part-time postal workers entertained a reasonable fear that their interest would not be given adequate protection if they were included in one unit. . . .[119]
>
> The second instance in which the Board invoked the special powers here under discussion was in an application relating to ships' pilots.[120] The Canadian Merchant Service Guild had applied to be certified for a unit of pilots operating on the east coast of Canada. The occupational group included, in addition to east coast pilots, others who were employed in the Great Lakes Area. The Board over-rode the claim of the employer that there should be a service-wide unit and determined that such a unit could not give satisfactory representation to the east coast pilots. The Board held that the nature of the pilotage engaged in by east coast pilots differed substantially from the type of pilotage engaged in by the Great Lakes pilots; there were different working conditions, rates of pay and length of the working year and the east coast pilots were geographically isolated from the others. In addition, and this factor had great significance, special conditions were applicable to Great Lakes pilots by reason of a Memorandum of Arrangements between the Secretary of Commerce of the United States and the

> Minister of Transport of Canada first entered into in 1960 and periodically revised thereafter.[121]

In the *Air Traffic Control Case No. 1*[122] the PSSRB held in this connection:

> Where national or industrial bargaining units are established under a regime of exclusive bargaining rights being vested in a bargaining agent, it is almost inevitable that some minority groups will believe their interests are being subordinated to those of the majority. Under the system of collective bargaining that prevails on this continent, the reconciliation of such conflicting interests must be left to be worked out according to the democratic process, at least in the absence of a showing of bad faith on the part of the majority.

Some of the limitations imposed by the PSSRA on the PSSRB's discretion to determine the composition of bargaining units were declared to apply only during the initial certification period. Nevertheless, the Board has rejected the argument that after the expiration of that period, it ought to approach the problem *de novo* and proceed to apply the criteria commonly applied by labour-relations boards under the general labour-relations legislation. As the Board said in the *Letter Carriers Case*,[123] "Surely, it was not the intention of Parliament that, once the initial certification period had come to an end, the principles embodied in [subsection] 26 (4) of the Act were to be cast aside as if they had never existed."

How effective was the policy incorporated in the legislation? First, the rules of the game governing the conduct of organizational compaigns, even during the initial certification period, were established and known. Employee organizations were able to concentrate on organizing employees in the predetermined bargaining units rather that on organizing fragments in the hope of Board recognition. In light of this, it is noteworthy that within two years of the coming into force of the legislation, over ninety-five per cent of the employees were in bargaining units for which bargaining agents had been certified by the Board.[124]

Since the expiration of the initial certification period, there have been a number of applications to split an existing unit. The PSSRB has taken the position that such an application should succeed only in exceptional circumstances and, in effect, it has applied a formula similar to that spelled out in the 'escape-hatch' provision. Indeed, in the *Quebec Air Traffic Controllers' Union Case*,[125] the Board said that where an employee organization seeks to sever a group of employees from an existing bargaining unit so that they may be represented by a different bargaining agent, "it would seem that the onus of proving that the *existing* bargaining unit does not permit 'satisfactory representation' of the employees that the applicant purports to represent is even greater than upon initial certification." The general policy of the Board in severance applications was set out in the *Heating, Power and Stationary Plant Operations Case No. 2*:[126]

> One of the major concerns of the Board . . . is the proper functioning of the bargaining system in the Public Service. The sheer size of the Service, the dispersal of employees throughout the country and at various points in the world, the complexity of the employment relationship and the multiplicity of classifications into which the employees are divided makes undue fragmentation impractical and probably unworkable. . . . lack of uniformity in conditions of employment among various sections of the Public Service is more difficult to justify than it is in the private sector. It is our considered opinion that the inclination of the Board should be towards service-wide units. That is not to say that there are no circumstances in which a service-wide occupational group should not be split into two or more segments. However, there is a heavy burden resting on an applicant that seeks severance. That onus is not met by showing merely that the unit proposed is just as appropriate as a service-wide unit. Nor is it met by showing merely that the employees in the proposed unit desire to be represented by another employee organization; a bargaining unit ought not to be deemed appropriate solely because it is co-extensive with an employee organization's success in recruiting membership among a group of employees. . . . There may be other circumstances that may not satisfy the requisite onus and there are some that would satisfy the onus. We do not deem it desirable to enter into speculation.

In that case the PSSRB said that the facts spoke for themselves, and the prospects, if the Board accepted the proposal of the applicant, were not ones that could be viewed with any degree of equanimity. Four applications by the Canadian Union of Operating Engineers were consolidated for hearing in this proceeding. The applications sought to sever from two service-wide units of heating, power and stationary plant operations (supervisory and non-supervisory units) the engineers stationed at four particular locations where government structures or complexes of structures were situated.

In another case[127] the Canadian Air Line Pilots Association sought to sever a group of executive pilots and helicopter pilots from a service-wide aircraft-operations unit where the other employees were engaged in the inspection and regulation of aircraft, aircraft equipment and aircraft facilities. The PSSRB found that there was no established practice of functional differentiation between the groups. The applicant's argument that it had enjoyed a special relationship with the employer carried no weight with the tripartite PSSRB.

The most hotly contested application for severance was that made by the Quebec Air Traffic Controllers' Union.[128] The PSSRB rejected an application to sever from a service-wide unit of traffic controllers those traffic controllers under the jurisdiction of the Quebec Region of the Ministry of Transport. The Board found that from a functional point of view, that is, taking into account the highly integrated system of air-traffic control in the country, it would be difficult to justify the creation of a separate bargaining unit as proposed by the applicant. The question had been raised whether a separate unit should nevertheless be established on the ground that the unit as then constituted did not permit 'satisfactory representation'. In dealing with this question, the Board said that 'satisfactory representation' must be distinguished from the concept of 'fair representation'. It held, on a careful examination of the evidence presented, that although the Canadian Air Traffic Control Association, supported by the majority of its members, had officially opposed bilingualism in air-traffic control, the view of the minority was not suppressed, but was forcefully articulated both within the Association and in the public media, and led the Association to *modify* its position. No restrictions were imposed on those who wished to express dissent from official policy. The opportunity for francophone members to be served in their own language was increasing. There was no evidence of discrimination against francophone members. The application for certification of a Quebec unit was therefore rejected.[129]

In two instances existing service-wide units have been split up; in both instances it was clearly established that the existing unit did not permit satisfactory representation of the employees it included. The first of these instances involved the postal operations occupational group. The Council of Postal Unions (CPU), consisting of the Letter Carriers Union of Canada (LCUC) and the Canadian Union of Postal Workers (CUPW), had been certified in 1968 as the bargaining agent for a unit of non-supervisory employees in this occupational group, except for railway mail clerks and part-time postal workers. The CPU was subsequently certified as bargaining agent for the part-time postal workers.[130] In 1974, on application of the LCUC, the PSSRB revoked the two certificates issued to the CPU on the ground that "the [CUPW was] no longer acting in a manner that [gave] the [CPU] appropriate authority to enable it to discharge its duties and responsibilities as a bargaining agent on behalf of the employees in the bargaining units" for which it had been the certified bargaining agent.[131] Thereafter the LCUC applied for certification as bargaining agent for the employees who were engaged in what might be described generally as the 'letter-carrier function'. The application was opposed by CUPW, among other opponents. CUPW sought certification for all the employees for whom CPU had previously been the bargaining agent. The Board determined that two bargaining units were appropriate and issued two separate certificates to LCUC and to CUPW.[132] In its decision the Board took into account a number of considerations, including the fact that the collective agreements conveyed the impression that the relationship that existed was actually between the employer and two distinct entities, the traditional organizational separation between the groups, and clear functional differentiation between the groups. The Board expressed the opinion that it was not departing from its views in the *Heating, Power and Stationary Plant Operation Case No. 2*,[133] that a bargaining unit ought not to be deemed appropriate solely because it is co-extensive with an employee organization's success in recruiting membership among a group of employees. In the case before it, the organization seeking certification was not a new organization suddenly springing into activity to obtain advantages for a special group; there was here a deep-rooted pattern of organization and bargaining over a long period of time.

In the second instance the PSSRB, in 1968, had certified the Federal Government Dockyards Trades and Labour Council (referred to below as the 'National Council') composed of nine employee organizations on the east coast and eleven on the west coast, as bargaining agent for all employees in the ship-repair occupational group. In 1976 the National Council was dissolved, and two councils were established, one consisting of east-coast employee organizations and the other of west-coast employee organizations. The two councils then applied for certification as bargaining agents for each group of employees concerned, and the Board divided the occupational group into two separate bargaining units. In the course of its decision, the Board said in part:

> One undeniable fact is that since it came into existence, the National Council simply has not functioned as the bargaining agent for the employees in the Ship Repair Group.
>
> ...What happened was that the West Coast Council and the East Coast Council [which had been in existence before the National Council was established], although they were the creators of the National Council, made no effort to transform it into an operational employee organization. . . . While representatives of the two councils negotiated with the Employer in the name of the National Council and entered into collective agreements in its name, this was no more than "window dressing".
>
> ...The instant and the twin application have been made by the west and east coast councils in an effort to fill [a] vacuum by acquiring, *de jure*, the bargaining rights for the Ship Repair Group employees who are members of their respective constituent local unions in their respective coastal regions. . . .[134]

As was pointed out earlier,[135] the initial certification-period limitations did not apply to certification applications affecting separate employers. However, even in this area the PSSRB was bound by the provision of section 32 of the PSSRA, which barred inclusion in one unit of employees in more than one occupational category; it was also bound by the provision in that section directing it to take into account plans of classification. Although the five occupational categories listed in the definition section of the Act governed separate employers, there was no program for the separate employers, as there was for the central administration, whereby it was determined which employees fell within a certain occupational category or a certain occupational group. In the early days of the history of the legislation, employee organizations applied in several instances for all employees in one of the listed occupational categories; on agreement of the parties, the Board determined the appropriate unit to consist of all employees within an occupational category.[136] During this period, the Research Council Employees Association sought, and the Board determined, units for the National Research Council according to occupational groups, probably based on the degree of successful organization at any given time. In one instance, where the Association made two separate applications for the employees in two occupational groups, the Board persuaded the parties to agree that one bargaining unit be determined to comprise all employees in the two occupational groups.[137] In its decisions on all these applications, the Board gave no reasons for including in one unit the employees in more than one occupational group other than that it was done on agreement of the parties.

In 1978 an employee organization sought certification on behalf of a number of units of employees of the Auditor General of Canada, comprising all the employees in each of four of the listed occupational categories. At the hearings before the Board, the parties agreed that the units should be described as employees "who perform the same or substantially the same duties and responsibilities as those specified and defined in the Canada Gazette Special Edition No. 8, dated March 20, 1967" for certain specified occupational groups in a certain occupational category. The PSSRB determined the units in the terms agreed upon by the parties.[138] The following year, on an application by an employee organization for certification of a unit comprising all employees in the administrative support category of the Social Sciences and Humanities Research Council, the employer proposed that a similar course be adopted, but met with objections from the applicant. The Board acceded to the proposal of the employer.[139] The Board noted that the unit proposed by the employer embraced all employees employed at the time in the employer's administrative support category. In another application involving the same separate employer,[140] the Board again acceded to the proposal of the employer to describe the bargaining unit in terms of four of the occupational groups specified in the manner indicated above; it also included in the unit "all employees referred to as Grants Program Officers". The Board noted in its decision that "neither party suggested at the hearing that the Grants Program Officer classification falls within any of the occupational groups in the Administrative and Foreign Service Category for the 'central administration'."

In the *Canadian Forces Base, Cornwallis Case*,[141] where the separate employer was the Staff of the Non-Public Funds, Canadian Forces, the PSSRB departed from its policy of favouring service-wide units and determined that a unit of the employees at one location was appropriate. The employees concerned were employed in the Canadian Forces Exchange System (CANEX), where the personnel-support programs are designed to provide a reasonable level of goods, services and recreational facilities to Canadian Forces personnel in their areas of service. In the course of its decision, the Board said:

> The employees of CANEX and indeed all Non-Public Fund employees, by reason of their terms and conditions of employment and the nature of CANEX and NPF operations, do have an employment relationship with their employer . . . quite different from that which exists in the case of any other separate employer of which we are aware and its employees.

The Board found that although the base was subject to the administrative supervision and policy direction of Headquarters, both in regard to business operations and terms and conditions of employment, the effective authority with regard to the implementation of employment policies and practices largely rested with the local base commander, who had large scope for independent operational business initiatives. The Board also found that a unit confined to a single base location would not create any serious difficulties for either the employer or the Department of National Defence from the point of view of staff relations or other operational considerations.

The target date set for the original reclassification of employees to make it possible for the PSSRB to define bargaining units was not met, and in 1967 some employees had been 'provisionally assigned' to certain occupational groups. The Board dealt with certification applications on the basis of the provisional assignments. Since authority to classify employees in the central administration is vested in the Treasury Board[142] and, in other cases, in the respective separate employers,[143] to determine bargaining units on the basis of a scheme of occupational classification is likely to create problems if the employer reclassifies a group of employees.[144]

In a number of instances, after an employee organization had been certified as bargaining agent for employees in a particular occupational group, the population of the group was altered when the employees were assigned to another occupational group. Fortunately, through a happy series of coincidences, in almost all[145] the situations where this occurred at this stage, the employees who were reclassified were assigned to a group with the same bargaining agent as the group from which they had been 'withdrawn'. In the result, what an employee organization lost on the 'apples', so to speak, it made up on the 'oranges'.

Nevertheless, the PSSRB is aware that problems may arise in this connection, and in the *Social Sciences and Humanities Research Council, Administrative Support Category Case*[146] it stated:

> It should be noted that the criterion for defining the bargaining unit is not the nomenclature of the two occupational groups, but

> the actual duties and responsibilities of the particular employees. The introduction of new position titles and/or classifications could not, in itself, lead to the conclusion that they are not encompassed in the definition of this bargaining unit.[147]

The problem in the public services of carrying on collective bargaining where there is a multiplicity of bargaining units has been a matter of considerable concern to many employers and to many bargaining agents. Criticisms have been voiced that the number of bargaining units in the federal public service imposes an unduly heavy burden on the parties. This burden stems from the facts that bargaining is an almost constant process, and that the large number of bargaining units may expose the public to frequent interruption of services in any one area of government activity. One approach to the problem would be to merge two or more existing bargaining units. Under the general labour-relations legislation, where voluntary recognition of a bargaining agent is permitted, mergers of bargaining units on consent of the parties is countenanced. But this approach cannot be adopted under the PSSRA.[148]

It should not be taken for granted that a reduction in the number of bargaining units will necessarily lead to more effective and peaceful bargaining:

> ...multiple units may create competition among the organizations representing employees in their bargaining with the employer and thus encourage each organization to outdo the others in bargaining benefits. Who is to say that an organization representing an all-encompassing unit cannot exercise similar pressures by the mere fact that it represents all of the employees in one unit? The inclusion in one unit of employees having separate interests and goals does not eliminate such matters from being issues at the bargaining table.[149]

A similar view holds that, "The larger the employee units selected for representation, the fewer the number of elections, negotiations and possible rivalries among organizations to influence settlements. But the larger the units, the more likely it is that minorities within a group will feel that their special interests have not been adequately recognized and the greater the possibilities of internal friction."[150] A related aspect of this view, touching on the effects of collective bargaining, is that:

> The long-run tendency appears to be in the direction of more and larger groupings. If that trend persists, it may create more public emergency disputes. Bigger bargaining is not necessarily better bargaining.[151]

Loss of Right to Represent Employees and Successor Rights

Except where collective bargaining legislation gives statutory recognition to a particular employee organization as the sole bargaining agent for the employees in a specified unit, the applicable legislation normally spells out the circumstances in which the right acquired by an organization to represent employees may be terminated. Under the PSSRA the grounds for the termination of such rights are:

- Displacement of an incumbent bargaining agent upon a successful application for certification by another employee organization
- Loss of majority support among the employees in the bargaining unit
- Abandonment of certification by a bargaining agent
- The PSSRB's determination that the bargaining agent has ceased to act as such
- The PSSRB's determination that a bargaining agent, if it were applying for certification, would not have been certified initially by reason of management participation in its affairs, receiving or paying money for activities by a political party, or discrimination against an employee because of sex, race, national origin, colour or religion
- The bargaining agent has obtained certification by fraud.

Where a council of employee organizations has been certified as bargaining agent, the bargaining rights of the council may also be terminated because of an alteration in the constituent membership of the council, or because, by reason of other circumstance, the council no longer meets the additional requirements for certification laid down for a council of employee organizations.

Paragraph 40 (1) (*b*) of the PSSRA declares that where an employee organization is certified as bargaining agent for a bargaining unit, "if another employee organization had been previously certified as bargaining agent in respect of employees in the bargaining unit, the certification of the previously certified bargaining agent is thereupon revoked in respect of such employees".

An application for revocation of certification on the ground that the bargaining agent no longer represents a majority of the employees in a bargaining unit may be made only by a person claiming to represent a majority of the employees in the bargaining unit.[152] It is not sufficient for the person seeking revocation of certification merely to allege that he represents a majority of the employees in the bargaining unit. The PSSRB's *Regulations and Rules of Procedure* provide[153] that:

> 41. (1) Where an application is made under [section 41 of the PSSRA], evidence of signification by employees that they no longer wish to be represented by the employee organization certified as bargaining agent for the bargaining unit shall not be accepted by the Board unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and is filed together with the application.
>
> (2) No oral evidence of signification by employees that they no longer wish to be represented by the employee organization certified as bargaining agent for the bargaining unit shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).

The evidence of signification must be couched in terms that indicate that the applicant is authorized to make an application for revocation of the certification. A statement merely critical of the bargaining agent, tabled at its annual meeting, is not sufficient for the purpose.[154] If, after hearing an application, the PSSRB is satisfied that a majority of the employees in a bargaining unit no longer wish to be represented by the employee organization, it is required by subsection 41(4) to revoke the certification of the employee organization as bargaining agent for the unit. However, before doing so, it may, in its sole discretion, under subsection 41(3), direct the taking of a representation vote in order to determine whether a majority of the employees in the bargaining unit no longer wish to be represented by the certified bargaining agent. Although there is no decision of the Board on the point, it is probably safe to infer that the Board will follow the same policy that it has adopted in connection with the displacement of one bargaining agent by another; that is, it will direct that a representation vote be taken to ascertain the wishes of the employees. The Board will probably not revoke a certification on the ground here under discussion unless a majority of the employees indicate in such a vote that they do not desire to continue to be represented by the incumbent bargaining agent. The Board has not spelled out the lower limit of any marginal area where a vote will be directed if the documentary evidence of signification of desire not to be represented is less than 50 per cent of the employees in the bargaining unit. However, it has held that such signification by a fraction of a percentage in excess of 40 per cent is not sufficient for that purpose.[155] In view of the Board's decision in the *Education Case*,[156] it is highly improbable that the Board would direct a vote to be taken where the documentary evidence of support for a decertification application is below 50 per cent. An application for revocation of certification on the ground here under discussion may be made only within the periods during which an application for certification may be made by an employee organization that seeks to displace a certified bargaining agent.[157]

The PSSRB is required to revoke the certification of a bargaining agent where the bargaining agent advises the Board that it wishes to give up or abandon its certification. Subsection 42(1) of the PSSRA provides that such advice can be given only by the certified bargaining agent and may be given at any time.[158] There are no time constraints applicable here as there are in the case of an application for revocation on the ground of loss of majority support.

The PSSRB is also required by subsection 42(1) to revoke the certification of a bargaining agent where it "determines that the bargaining agent has ceased to act as such." An application for revocation on this ground may be made either by the employer or by any employee.[159] Again, there are no time constraints applicable to such a situation. In the *Jessome Case*[160] the applicant alleged that the group of employees in which he was included had not been accorded fair representation in the negotiations that led to the execution of a collective agreement for the employees in the bargaining unit concerned. The Board found that in the circumstances presented in evidence, the bargaining agent had not acted in bad faith in its dealings on behalf of the group in which the applicant was included and held that the applicant had failed to show that the bargaining agent had ceased to act as such. Mere dissatisfaction with the speed at which negotiations were being conducted between the bargaining agent and the employer is not sufficient ground for a finding that the bargaining agent has ceased to act as such.[161]

The fifth ground for revocation listed above, where the PSSRB determines that a bargaining agent would not, if it were applying for certification, have been certified initially,[162] is applicable to a number of conditions that did not exist at the time of certification, but developed subsequent to the certification. As was pointed out earlier, if these situations had been in existence at the time of application for certification, the Board would have been prohibited from certifying the employee organization.[163] If they did exist at that time and the employee organization misled the Board, the appropriate ground for an application for revocation would be an allegation that the employee organization obtained certification by fraud. There is no time constraint on the making of an application for revocation on either of these grounds.

The only instances in which revocation was sought in respect of a council of employee organizations[164] involved the Council of Postal Unions.[165] On the evidence presented, the PSSRB found that there had been no alteration in the constituent membership of the Council,[166] but that by reason of other circumstances, the Council no longer met the additional requirements for certification necessary to a council of employee organizations. The Board held that although there was no formal act by either of the constituent members of the Council to divest the Council of the requisite authority, the authority of the Council had nevertheless been annulled by action or lack of action on the part of one of the constituent members. This member had refused to join in taking the necessary timely action of giving notice to the employer to commence bargaining for the renewal of the collective agreements.[167]

The effect of revocation of certification depends on the ground for revocation. Where revocation is the result of a certification proceeding in which a rival organization displaces a previous bargaining agent, in whole or in part, the newly certified bargaining agent is substituted as a party to any collective agreement or arbitral award in force at that time, relating to the employees in the bargaining unit determined in the new certification.[168] Subsection 43(2) of the PSSRA provides that if a certification is revoked because it has been obtained by fraud, the *employee organization* concerned is not entitled to claim any right or privilege flowing from the certification, and any collective agreement or arbitral award applying to the bargaining unit for which it was certified is void. Where the certification is revoked for any of the other reasons listed above, section 46 provides that the Board has authority, upon application, to determine any question concerning any right or duty of the bargaining agent whose certification is revoked or of any new bargaining agent replacing it. In all situations where certification is revoked, no matter what the circumstances of the revocation may be, the Board has authority to direct the manner in which any right acquired by, or determined by the Board to have accrued to, an employee affected by the revocation is to be recognized and put into effect. The application for relief may be made by or on behalf of any employee in the bargaining unit concerned.[169]

Under Canadian labour-relations legislation, in the absence of express provision for the situation, an employee organization that merges or amalgamates with another organization is usually treated as having lost its right to represent the employees for whom it was the bargaining agent. The same holds true when there is a transfer of jurisdiction among employee organizations. Under section 48 of the PSSRA, when such a situation occurs, the PSSRB is given authority, on the application of any employee organization affected, to examine the question and declare or determine what rights, privileges and duties, if any, have been acquired or are retained by that employee organization.[170]

A number of statutes in Canada also make provision relating to the 'transfer' of bargaining obligations to a new employer or an employer who sells (that is, leases, transfers or otherwise disposes of) his business.[171] Such provisions have no counterpart in the PSSRA, relative to transfers between parts of the public service represented as employer by the Treasury Board and parts of the public service represented by separate employers. From time to time over the years since the Act came into force, some public servants have been transferred from separate employers to the Treasury Board,[172] and a number of new separate employers have been established and brought under the part of the Act relating to separate employers.[173] Where employees were transferred to the jurisdiction of the Treasury Board, few problems have arisen, since, in the vast majority of cases, the employees transferred continued to be represented by the same bargaining agent that had represented them when they were employees of a separate employer.[174] Where employees have been transferred to a new separate employer, whether from the Treasury Board or from one separate employer to a newly established separate employer, the move has necessitated new applications for certification by the employee organization that previously represented the employees concerned.[175] There have also been instances where groups of employees have been reclassified and consequently moved from one occupational group to another.[176] On the whole, such movement has not caused serious difficulty in the past, since, in the vast majority of cases where this occurred, the employees who were reclassified were represented by the same bargaining agent as they had been before they were reclassified. However, with the growth in the number of competing employee organizations in the public service in the last few years, problems may arise that may not be as easily resolved as they have been in the past.[177]

Some portions of the public service of Canada (to use that term in the broad sense)[178] fell under the Canada Labour Code before the PSSRA was enacted and remained under the Code. Situations may arise in which it is deemed advisable to transfer some portions of the public service that come under the PSSRA to the jurisdiction of the Canada Labour Code, and vice versa. Such transfers are now provided for by parallel provisions in both statutes.[179]

Concomitants of the Right to Represent Employees

The rights that an employee organization acquires on being certified as the bargaining agent for a bargaining unit of employees are expressly set out in the PSSRA. In the case of an initial certification, that is, where the bargaining agent certified is not displacing a previous bargaining agent for that unit, the newly certified bargaining agent acquires the following rights under paragraph 40(1)(*a*):

> ...the employee organization has the exclusive right under this Act
> (i) to bargain collectively on behalf of employees in the bargaining unit and to bind them by a collective agreement until its certification in respect of the bargaining unit is revoked, and
> (ii) to represent, in accordance with this Act, an employee in the presentation or reference to adjudication of a grievance relating to the interpretation or application of a collective agreement or arbitral award applying to the bargaining unit to which the employee belongs. . . .

Where one bargaining agent displaces another, the PSSRA confers on the new bargaining agent certain additional rights. It provides that:

> ...if at the time of certification, a collective agreement or arbitral award binding on the employees in the bargaining unit is in force, the employee organization shall be substituted as a party to the agreement or award in place of the bargaining agent that had been a party thereto and may, notwithstanding anything contained in the agreement or award, terminate the agreement or award, in so far as it applies to the employees in the bargaining unit,[180] upon

two months notice to the employer given within one month from such certification.[181]

However, a newly certified bargaining agent that displaces a previous bargaining agent may not rely on conciliation-board proceedings engaged in by the predecessor. Conciliation-board proceedings engaged in by a predecessor do not entitle a newly certified bargaining agent to call or authorize a lawful strike as the predecessor would have been entitled to do.[182]

Section 6 of the Public Sector Compensation Restraint Act declares that every compensation plan and the terms and conditions of employment in every collective agreement or arbitral award that includes a compensation plan are extended by virtue of the Act. There is nothing in the Act that precludes a bargaining agent that is certified to replace an incumbent bargaining agent from giving notice, in accordance with subsection 40(1) of the PSSRA, to terminate a collective agreement or arbitral award binding on its predecessor. However, since the compensation plan and the terms and conditions of employment in such an agreement or award are continued in force, the entitlement of the new bargaining agent to engage in effective collective bargaining, should it give notice of termination, becomes, for all practical purposes, academic.

Subsection 9(2) of the PSSRA implies that the exclusive right to bargain collectively is exempt from a prohibition contained in subsection 9(1) of the PSSRA. This prohibition forbidding a person in a managerial or confidential capacity to discriminate against an employee organization is not to be construed as preventing such a person "from receiving representations from, or holding discussions with, the representatives of any employee organization." However, the receipt of such representations or the holding of such discussions obviously cannot be carried to the length of determining terms or conditions of employment.

The exclusive right vested in a bargaining agent to enter into a collective agreement is absolute. The determination of who shall serve as a spokesman for the bargaining agent at the bargaining table, what demands are to be put forward to the employer on behalf of the employees in the bargaining unit, whether proposals of the employer are to be accepted, how ratification, if any, of terms of settlement arrived at in the course of bargaining is to be carried out, are all matters that are under the sole control of the bargaining agent itself. Of course the bargaining agent is bound by the provisions of its constitution or by-laws. However, if any dissatisfied member were to allege that the bargaining agent had not observed its constitution or by-laws, the remedy lies, not under the PSSRA, but perhaps in another forum at common law.[183]

In so far as the exclusive right of the bargaining agent to represent employees in the bargaining unit with respect to grievances is concerned, that right is confined to grievances relating to the interpretation or application of a collective agreement or arbitral award applying to the bargaining unit to which the employee belongs. As we shall see later,[184] in respect of any other type of grievance, an employee may act on his own behalf or may seek the assistance of his bargaining agent.[185] We shall deal later with the question of whether a duty rests on a bargaining agent to give an employee fair representation.[186]

Notes

1. S.J. Frankel, *Staff Relations in the Civil Service: The Canadian Experience* (Montreal: McGill University Press, 1962), p. 168. (Hereafter referred to as *Staff Relations*.)

2. *Report of the Preparatory Committee on Collective Bargaining in the Public Service* (Ottawa: Queen's Printer, 1965) pp. 4–5. (Hereafter referred to as *Report of the Preparatory Committee*.)

3. *Ibid.*, pp. 28–30. See also Robert M. Adams, "Collective Bargaining in the Canadian Public Service," in *Proceedings of the North American Conference on Labor Statistics* (Washington, D.C.: U.S. Department of Labor, 1969), pp. 33–34.

   The federal pattern in the United States has been one of decentralized, rather than centralized, bargaining. For example, each executive department or agency has authority to enter into its own collective agreement with an employee organization that had acquired exclusive recognition for an appropriate unit of its employees. See Executive Order 10,988 (issued in 1962) and Executive Order 11,491 (issued 29 October 1969), which replaced Executive Order 10,988. The same principle has been embodied in the Civil Service Reform Act of 1978 (Public Laws 95–454, s. 7103 [3]).

4. The Financial Administration Act, s. 3, establishes the Treasury Board and provides that it is to consist of the Minister of Finance and four other members of the Privy Council, plus other members of the Privy Council who may serve as alternates.

   In the *Economists' Sociologists' and Statisticians' Case* (1978) PSSRB file 161–2–168, the Board held that "Her Majesty in right of Canada as represented by the Treasury Board" was not a 'person' within the meaning of section 8 (the 'unfair practice' section) of the PSSRA, and consequently could not be named as a respondent on a complaint relating to subsection 20 (1) of that Act. See further, in this connection, Chapter 12, p. 629, below.

In the *Gestrin and Sunga Case* (1971) PSSR Reports K 721 at K 724, the advocate for a bargaining agent invited the Board "to hold that the relationship between Her Majesty and the Treasury Board was that of principal and agent, i.e., he suggested that the Treasury Board was the agent of Her Majesty." In rejecting this argument, the Board said: "The relationship between a principal and an agent differs in many important respects from the relationship between a representative and the person he or it represents. . . . Indeed, even if the argument submitted . . . were sound, the agent (the Treasury Board) would be acting for a disclosed principal (Her Majesty) and the principal, rather than the agent, would be the employer."

5. For a listing of the separate employers, see Table 4, below.

6. In practice the parties to each collective agreement are identified on the frontispiece of the agreement as the 'Treasury Board', on the one hand, and the bargaining agent concerned, on the other hand, and the agreements are executed by the parties in the same fashion.

7. The persons so named are officials of the Treasury Board, who are leaders of the bargaining team. Departmental officials who serve on a bargaining team also usually sign, although they have no express authority from the Treasury Board to do so. For an account of the way in which the bargaining team acquires its mandate and carries out its bargaining function, see Chapter 6, below.

8. For recommendations concerning the role that should be played by departmental managers, see *Report of the Special Committee on the Review of Personnel Management and the Merit Principle* (Ottawa: Minister of Supply and Services Canada, 1979), p. 159 ff. (Hereafter referred to as *Report of the Special Committee*.)

9. See Chapter 4, below.

10. For a discussion of this point, see Chapter 6, p. 268 ff., below.

11. See Paul Malles, *The Institutions of Industrial Relations in Continental Europe* (Labour Canada, Research and Development) (Ottawa: Information Canada, 1973).

12. The Christian Labour Association of Canada has voiced the only serious opposition to this approach that has been offered by an employee organization in Canada. The originators of this Association, members of the Dutch Reformed Church, seek the adoption in Canada of the European model of representation.

13. The pros and cons of exclusivity were canvassed in Staff Reference Paper, No. 16 (prepared for the Preparatory Commitee), pp. 31, 33.

14. Similar provisions are found in the public service labour-relations statutes of most other Canadian jurisdictions.

    In the federal public service of the United States, the Presidential Executive Order 10,988 (17 January 1962), which accorded a form of bargaining rights to federal public servants, attempted to reconcile two divergent approaches. The Executive Order adopted the recommendation of the President's Task Force on Employer-Employee Relations in the Federal Service, which reported on 30 November 1961 that agencies of government of the United States accord recognition to employees, as a transitional measure, on a three-tier level, informal, formal and exclusive, depending on the extent of the membership of an organization. A later task force recommended in 1969 that informal and formal recognition be abolished, and this recommendation was incorporated in Presidential Executive Order 11,491 in 1969. The Civil Service Reform Act of 1978, Public Law 95–454, adopted the exclusive bargaining-rights principle, but provided for "national consultation rights" (that is, the right to be informed of any substantial change in conditions of employment proposed by an agency and to be permitted a reasonable opportunity to present its views and recommendations) for an organization that represents a substantial number of the employees in an agency, but only where no other organization has exclusive bargaining rights (¶7113). See *A Policy for Employee-Management Cooperation in the Federal Service: Report of the President's Task Force on Employee-Management Relations in the Federal Service*, 30 November 1961 (Washington, D.C.: U.S. Department of Labor, Labor-Management Administration. Reprinted 1969), pp. 11–19; and *Labor Management Relations in the Federal Service: Report and Recommendations: Executive Order 11,491*, 29 October 1969 (Washington, D.C.: U.S. Government Printing Office), pp. 33–36.

15. See in this connection Chapter 12, pp. 622 and 629–30, below.

16. The federal legislation avoided the term 'trade union', probably in deference to some organizations in the public service that in the early days shuddered at the thought of being classed with such 'radical' associations as trade unions.

17. Emphasis added.

18. (1971) PSSR Reports K 613 at K 639. The Customs and Excise Union was a component of the Public Service Alliance of Canada (the employee organization that had been certified as bargaining agent for employees in various units employed, among other places, at the port of Windsor). In this case the PSSRB denied an application for a declaration that the Windsor and District Branch of the Customs and Excise Union had called or authorized an unlawful strike. The Board denied the application on

the ground that such a declaration could be made only in respect of an employee organization.

19. (1967) PSSR Reports K 6.

20. (1967) PSSR Reports K 47 at K 51.

21. In its decision the PSSRB went on to point out that among the organizations that had made representation to the Joint Committee on Employer-Employee Relations in the Public Service of Canada, there were a number whose membership was not confined to employees in the public service, and whose objects were not expressly pointed at bargaining under the present legislation. The Board noted that at no time during the proceedings before the Committee or in Parliament was there any suggestion that these organizations might be beyond the pale. At K 52.

22. Morton Robert Godine, *The Labor Problem in the Public Service: A Study in Political Pluralism* (New York: Russell & Russell, 1951), pp. 75–76 (hereafter referred to as *The Labor Problem*), points out that a distinction must be drawn between the allegiance required of the military establishment and of civil servants doing work essential to the vital interests of the state, on the one hand, and of postal employees, clerks and mechanics, on the other. Of the latter group Godine remarks:

> The loyalty of a group of individuals to an association which expresses their interests in some specialized aspect of their lives rarely exhausts the sum total of their potential devotion to causes of collective concern. Citizenship itself may thus not only embrace but derive its very richness from a multiplicity of loyalties. The allegiance which the individual owes the state may be "unified," . . . in the sense that it is compounded of a number of loyalties arranged and coördinated, if necessary, in a hierarchy of values, but not "undivided" in the sense that it inherently excludes all other loyalties as incompatible with its own. It is only in the event of a challenge to its authority or of an intrinsic incompatibility between public duties and group affiliations that the state may properly deny the legitimacy of other loyalties. The formulation of policy in this matter should not be derived from general presuppositions concerning the public service viewed as an undifferentiated whole. The threat to impartiality should be real and clearly recognizable before affiliation is prohibited.

23. Some jurisdictions have adopted legislation that expressly forbids organizations of public servants to become affiliated with bodies outside the particular service in which its members are employed. For a discussion of the situation in Great Britain, see Frankel, *Staff Relations*, p. 6. In a number of Canadian jurisdictions the

relevant statutes prohibit affiliation by provincial or municipal police associations with other labour organizations.

24. (1967) PSSR Reports K 47; see also K 53.

25. (1967) PSSR Reports K 65.

26. (1968) PSSR Reports K 109.

27. (1967) PSSR Reports K 65 at K 76-K 77. *Employer-Employee Relations in the Public Service of Canada: Proposals for Legislative Change*, (hereafter referred to as the *Finkelman Report*), Part II, p. 66, recommended that:

> The legislation should require every bargaining agent to provide to the Board an undertaking that its collective bargaining policies in all matters affecting the interests of public servants will in every case be controlled in their entirety by those members of the bargaining agent who are public servants. The legislation should also give the Board authority to provide a remedy where the undertaking is not observed by the bargaining agent.

The Yukon School Ordinance, R.O.Y.T. 1978, c. S-3, has incorporated this recommendation. S. 147 provides that the penalty for violating the prohibition is revocation of the certification.

28. (1967) PSSR Reports K 65 at K 67-K 68.

29. S. 32. See further in this connection Chapter 11, pp. 581-87, below.

For recommendations on political participation by public servants, see *Report of the Special Committee*, p. 171 ff.

For the situation in Canada prior to 1962, see Frankel, *Staff Relations*, pp. 6-8, 230-31, 244-48, 312-15. For a discussion of the position of public servants in the United States in relation to political activities under the Hatch Act and the relationship between political activities and the merit principle, see Godine, *The Labor Problem*, pp. 178-92.

30. Similar provisions appear in the relevant statutes of a number of other Canadian jurisdictions. The Quebec Civil Service Act goes furthest in this respect by prohibiting an association representing government employees from affiliating with any other association that engages in party politics or in financing a political party.

See Shirley B. Goldenberg, "Collective Bargaining in the Provincial Public Services" in *Collective Bargaining in the Public Service* (Toronto: Institute of Public Administration of Canada, 1973), pp. 26-27. The legislation governing collective bargaining for the Ontario Provincial Police Force, S.O. 1972, c. 96, s. 6, deals with the situation in a round-about way. It excludes from the scope of bargaining the conditions applicable to leaves of absence for any election to public office or any political activities.

Note should also be taken of one additional and unique feature of the New Brunswick Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, subsec. 34 (4). The Act declares that:

> The Board shall not certify as bargaining agent for a bargaining unit any employee organization where it is made to appear to the satisfaction of the Board that one of the purposes of the employee organization is the overthrow of constituted authority.

In the United States, the Labor Management Relations Act of 1947, as amended in 1959 (s. 304), has included a form of the non-partisanship principle in its general labour-relations legislation. It declared that:

> ...it is unlawful for any . . . labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

No similar prohibition is to be found in the *general labour-relations legislation* in any jurisdiction in Canada.

31. *United Food and Commercial Workers, Local 832, Shilo, Manitoba Case* (1981) PSSRB file 146–18–187. Similar undertakings were given by the same employee organization and by other locals of the same international union in (1981) PSSRB file 145–14–189 and (1981) PSSRB file 146–18–188.

32. For a discussion of the approach to such a situation in other jurisdictions in Canada, see J. Sack and M. Levinson, *Ontario Labour Relations Board Practice* (Toronto: Butterworth, 1973), p. 101 ff.

33. (1967) PSSR Reports K 6 at K 7 and K 12.

34. A number of Canadian jurisdictions have taken a similar stand.

35. R.O.Y.T. 1978, c. S-3, subsec. 140 (1).

36. See *Postal Operations Case No. 1* (1967) PSSR Reports K 26 at K 34-K 36 and *Aircraft Operations Case No. 2* (1971) PSSR Reports K 657 at K 675. But see *New Brunswick Teachers Federation* v. *Province of New Brunswick and Canadian Union of Public Employees* (1970) 3 N.B.R. (2nd) 189. The New Brunswick Public Service Labour Relations Board rejected an application for certification by the New Brunswick Teachers Federation on the ground that the group's constitution provided for a class of associate members who were not entitled to hold office in the Federation. The Board held that this provision of the constitution was in conflict with s. 5

of the New Brunswick Public Service Staff Relations Act (identical with s. 6 of the federal PSSRA), dealing with the freedom of an employee to become a member of an employee organization and to participate in its lawful activities. The decision of the Board was reversed by the New Brunswick Court of Appeal. Hughes J.A. said (p. 202):

> I am unable to find in section 5 or any other provision of the Act any legislative intent to empower the Board to consider the rights of members of an employee organization vis-à-vis their organization, or to refuse certification of an employee organization otherwise eligible for certification because of any limitation on the rights of its members.

Query: Would the decision of the court have been otherwise if the constitution had denied membership, rather than the right to hold office, to employees in the bargaining unit? Hughes J.A. based his decision in part on the fact that the New Brunswick Act (s. 32), like the federal legislation (s. 34), requires that the Board be satisfied that "a majority of the employees in the bargaining unit *wish* the employee organization to represent them as their bargaining agent" (emphasis added). That raises the question of what effect is to be given to subsec. 33 (1) of the New Brunswick Act (subsec. 35 [1] of the federal legislation), which empowers the Board to examine "such evidence as is submitted to it respecting membership of the employees in the proposed bargaining unit in the employee organization seeking certification".

37. (1967) PSSR Reports K 65.

38. *Ibid*. at K 82-K 83. The Board adopted the same approach in a similar situation in the *Home Economics Case No. 1* (1967) PSSR Reports K 88.

39. (1973) PSSRB file 140–2–1.

40. (1969) PSSR Reports K 335 at K 340-K 341. See also *Aircraft Operations Case No. 1* (1968) PSSR Reports K 153.

41. See, for example, Wartime Labour Relations Regulations, P.C. 1003 of 17 February 1944, subsec. 5 (5) and Industrial Relations and Disputes Investigation Act, S.C. 1948, c. 54, subsec. 7(2).

42. The term 'bargaining agent' is defined in s. 2 of the PSSRA as "an employee organization (*a*) that has been certified by the Board as bargaining agent for a bargaining unit, and (*b*) the certification of which has not been revoked".

43. (1976) PSSRB file 142–2–159. For further discussion of this case, see Chapter 9, note 33, below. The date of the commencement and the duration of the 'open season' in any particular case will now have to be looked at in light of subsec. 6(1) of the Public Sector Compensation Restraint Act (Bill C-124, 1982), which will also be discussed in Chapter 9, below.

44. (1967) PSSR Reports K1. For a contrary ruling, where the PSSRB found that the employer had not supplied 'misleading' information, see *Engineering and Land Survey Case No. 1* (1968) PSSR Reports K 264. As to whether a new application related to the same, or substantially the same, unit as an earlier application that had been refused, see *Fisheries Research Board Case No. 4* (1968) PSSR Reports K 275. In the last-mentioned case, the Board made the comment (at K 278) that "the bar imposed on an employee organization by s. 31 must be regarded as a limitation on the freedom of employees to be represented by a bargaining agent of their own choice; the section should, in our opinion, be narrowly construed. . . ." See also *Canadian Forces Base, Cornwallis Case* (1980) PSSRB file 146–18–176.

45. For a discussion of the nature of an employee organization that may be certified, see p. 75 ff., above.

46. See above, p. 80 ff.

47. For a discussion of the relevant provisions of the Act and the manner in which they have been applied, see below, p. 99 ff.

48. See, for example, *Communications Security Establishment Case* (1981) PSSRB file 142–13–191; *United Food and Commercial Workers, Local 832, Shilo, Manitoba Case* (1981) PSSRB file 146–18–187.

49. *Aircraft Operations Case No. 2* (1971) PSSR Reports K 657 at K 677.

50. (1967) PSSR Reports K 26 at K 28-K 29.

51. PSSR Reports E 7-E 8.

52. The Ontario Labour Relations Act, R.S.O. 1980, c. 228, subsec. 9(2) provides that in connection with the certification of a council of trade unions, "Where the Board is of opinion that appropriate authority has not been vested in the applicant, the Board may postpone disposition of the application to enable the constituent unions to vest such additional or other authority as the Board considers necessary."

53. See note 36, above.

54. *Postal Operations Case No. 2* (1968) PSSR Reports K 120.

55. (1969) PSSRB file 146–2–106.

56. PSSRB files 150–2–4 and 150–2–5.

57. See note 37, above.

58. (1968) PSSR Reports K 109.

59. (1976) PSSRB files 146–2–161 and 146–2–162.

60. (1967) PSSR Reports K 6 at K 12.

61. PSSR Reports D 1 and D 2. See also Policy Statements, PSSR Reports E 2.

62. PSSRB *Regulations and Rules of Procedure*, s. 31.

63. For the significance of this comment, see p. 94, below.

64. PSSR Reports E 2 and E 3.

    On occasion an employee organization that did not have the support of the requisite number of employees at the time when it applied for certification succeeded in recruiting additional members between the date of the application and the date of the hearing of the application. In the *Postal Operations Case No. 4* (1968) PSSR Reports K 210, the PSSRB refused to accept additional proof of membership of such employees and held that the membership evidence had to be pertinent to the situation as it stood at the date of the application.

65. For example, in *National Film Board Case* (1968) PSSRB file 143-8-45, where the Board determined that the controlling date for ascertaining the population of the bargaining unit in the case was the date on which the application for certification was filed with the Board. The size of the bargaining unit was comparatively small.

66. Paragraph 9(2)(*a*). Emphasis added.

67. (1967) PSSR Reports K 65 at K 80-K 81.

    The Board took the same position in the *Aircraft Operations Case No. 2* (1971) PSSR Reports K 657 at K 675 ff. The language of the relevant provisions of the Canada Labour Code, R.S.C. 1970, c. L-1, as amended by S.C. 1972, c. 18, is now similar to that contained in the PSSRA. See paragraphs 117 (*h*), 118 (*d*), 126 (*c*) and subsec. 130 (3).

68. As to the provisional membership, see pp. 83–84, above. Regarding the duty of 'fair representation', see Chapter 12, p. 632 ff., below.

69. The arrangement is described in the Board's *Second Annual Report 1968-69*, p. 60, footnote, as follows:

    > In March 1953, upon the recommendation of both the Staff Side and the Official Side of the National Joint Council of the Public Service of Canada, a Treasury Board Minute was issued approving the voluntary check-off of membership dues of the various staff associations in accordance with arrangements to be made between each staff association and the Comptroller of the Treasury. The Preparatory Committee on Collective Bargaining in the Public Service . . . took the view that, in the bargaining system it proposed, "arrangements for the deduction from payroll of the membership dues of an employee organization should be determined by bargaining and regulated by agreement".
    >
    > ...The Committee therefore recommended that, "subject to arrangements for which provision may in the meantime be made as a result of collective bargaining, existing check-off

privileges be continued for a period ending on the last day of the twenty-eighth month following proclamation of the collective bargaining legislation". This recommendation was accepted in principle by the Government.

It may be that in light of this announcement, it was not found necessary to include a provision, contained in so many labour-relations statutes in Canada, guaranteeing that membership records would not be disclosed. See also Chapter 1, note 31, above.

70. PSSR Reports E 3-E 4.

71. In the *Hospital Services Case No. 1* (1967) PSSR Reports K 6, the employer's 'print-out' of dues deductions related to cards that had been filed with the employer authorizing check-off of dues to organizations that subsequently merged to form the Public Service Alliance of Canada. When negotiations reached fruition and the Alliance was established, it adopted a resolution at its founding convention that all members of the organizations that merged to form the Alliance were to be accepted as members in good standing of the Alliance, without having to sign new payroll-authorization cards. The members of the merging organizations were promised that within a fixed short period of time, any member could signify in writing to the executive secretary of the Alliance his or her intention not to become a permanent member. The coding of the employees' payroll cheques was altered to reflect the new situation several months before the certification application was made. The Board found on the evidence that the employees whose dues were checked off to the Alliance were fully aware that they were considered by the Alliance to be members of that organization, and that they were content to be so treated. The Board therefore held that the evidence of check-off in favour of the Alliance was sufficient to satisfy it that the persons whose names appeared on the employer's 'print-out' wished the Alliance to represent them as their bargaining agent (K 14-K 19).

Evidence was presented to the Board that a few persons did not approve of the founding of the Alliance and remained members only because they wished to retain entitlement to group insurance available at favourable rates to members of the Alliance or its components. The Board held that it should not concern itself with the reasons why employees joined an employee organization unless there was evidence that they had been induced to join by misrepresentation or by improper means. See also *National Research Council Case No. 2* (1970) PSSR Reports K 492 at K 495-K 496.

72. The form in which evidence of membership was to be presented was set out on p. E-5 in the policy statement referred to earlier.

73. In the course of a certification process, the employer is required to furnish a list of the persons whom it seeks to exclude from a bargaining unit on the ground that they are persons employed in a managerial or confidential capacity. If the employee organization concerned objects to the employer's proposals for designation, the matter is normally determined by the PSSRB before it ascertains the number of employees in the bargaining unit. However, in the *Defence Research Board Case No. 1* (1967) PSSR Reports K 22, since the number of persons who were likely to be designated was small, and since a large number of employees were members of the applicant organization, the Board certified the applicant on a card count and postponed its determination of designated persons.

74. Similar powers are vested in the public service staff-relations boards of a number of Canadian jurisdictions. In several jurisdictions, bargaining rights cannot be acquired in a certification proceeding on the basis of a 'card count'; a representation vote is mandatory if certain conditions are met by the applicant. Thus the Tribunal, under the Ontario Crown Employees Collective Bargaining Act, R.S.O. 1980, c. 108 subsec. 4 (1), is required to direct that a representation vote be taken when it has satisfied itself that not less than 35 per cent of the employees in the appropriate unit are members of the applicant organization.

75. (1968) PSSR Reports K 280 at K 282-K 284.

In this case the Board said that it would express no opinion regarding the circumstances in which a vote might be directed where the applicant had less than 50 per cent membership, and where there was no difficulty in determining the precise number of employees on the date of the making of an application.

76. (1979) PSSRB file 145−15−175.

In the *Printing Operations Case No. 1* (see note 37, above, at K 83), counsel for an opposing employee organization submitted that:

> ...where an employee has signed anappliction for membership and paid a fee in the sum of at least one dollar, but had not yet had his application approved by the executive body or the general membership of a union as the case may be, the membership "card" ought not to be treated as unequivocal evidence of the desire of the employee concerned. . . . [Counsel] submitted that such a card ought not to be accepted for the purpose of outright certification but rather as an expression of desire the validity of which . . . ought to be tested through the medium of a representation vote.

The Board rejected the submission.

77. See *National Research Council Case* (1973) PSSRB file 144−9−149 and *Second Annual Report of the Public Service Staff Relations Board,*

1968–69, p. 62. In an early case, *Auditing Case* (1968) PSSR Reports K 163 at K 165-K 166, the Board had rejected an application where the membership position of the employee organization concerned was 46.5 per cent. The Board subsequently relaxed its policy on this point.

78. *Fisheries Research Board Case* (1968) PSSR Reports K 167 at K 171. When the Canada Labour Code was revised in 1972 (S.C. 1972, c. 18), it provided that a representation vote be taken where not less than 35 per cent and not more than 50 per cent of the employees in the unit were members of the trade union, but only where no other trade union was the incumbent bargaining agent at the time (R.S.C. 1970, c. L-1, subsec. 127 [2]), as amended by S.C. 1972, c. 18). The *Finkelman Report* (Part I, p. 232) recommended that "the Public Service Staff Relations Act be amended to conform with the [Canada Labour] Code in this respect," although we entertain some misgivings on this score.

79. (1982) PSSRB file 142–2–198.

80. Ss. 18, 20, 23, 25, 26, 32, and 33.

81. Form 3, supplied by the PSSRB.

82. S. 18 states:
When an application is filed, the registrar shall

> (a) fix a terminal date, as directed by the Board, which date shall be not less than 10, and not more than 30 days after the date of the filing of the application. . . .

83. *Defence Research Board Case No. 2* (1968) PSSR Reports K 214.
However, weight will be given to statements of opposition only if they reflect a voluntary expression of the true wishes of the employees who signed them. In the *Canadian Forces Base, Cornwallis Cases* (1980) PSSRB files 146–18–179 and 161–18–208, the Board commented:

> ...the Board must be satisfied that the employees who sign documents in opposition to a certification application have not been improperly influenced to do so. We would hasten to state that we are not to be understood as saying that representatives of the employer cannot express their positions to employees concerning an application for certification. However, there is a natural inclination by employees to want to at least appear to identify themselves with the interests and wishes of their employer. This in turn makes them peculiarly vulnerable to influences, obvious or subtle, which may have the effect of undermining their ability to freely exercise their rights under the Act. Employers should be mindful of these considerations in their response to an application for certification as it relates to their employees. A failure to do so may invite the suggestion or allegations, of possible substance, that the employees were

subjected by their employer to undue influence, or even stronger forms of persuasion, to oppose the application.

84. *Clerical and Regulatory Case No.1* (1968) PSSR Reports K 183 at K 187-K 188.

In the *Hospital Services Case No. 1* (1967) PSSR Reports K 6 at K 20-K 21, the PSSRB based its decision, in part, on the fact that, although 900 notices to employees had been posted, not a single objection was received from any employee in the bargaining unit. See further on this case, note 71, above.

In the *Social Sciences and Humanities Research Council, Administrative and Foreign Service Category Case* (1979) PSSRB file 144−15−174, written statements of objection were filed by a number of employees alleging that some employees had been induced to sign membership cards through pressure and misrepresentation. The objectors were afforded an opportunity to appear and present evidence to support their allegations, but failed to do so. The Board held that no weight could be accorded the allegations.

85. See *Ships Crews Case No. 2* (1967) PSSR Reports K 104 at K 108.

86. (1967) PSSR Reports K 65 at K 87. See, also, *Ships Crews Case No. 2* (1967) PSSR Reports K 104 at K 107-K 108; *Auditing Case No. 1* (1968) PSSR Reports K 163 at K 165-K 166; and *National Research Council Case No. 2* (1970) PSSR Reports K 492 at K 495-K 496. In the *Translation Case* (1978) PSSRB file 144−2−170, in a contest between two organizations, one of the organizations, in an attempt to bolster its claim to certification without a vote, submitted in evidence a number of printed forms of resignation signed by persons who had been members of the other organization. The Board treated the documents as statements of opposition. See also in this connection the *Veterinary Science Case* (1978) PSSRB file 142−2−172.

87. *National Research Council Case* (1973) PSSRB file 144−9−149; *Translation Case* (1978) PSSRB file 144−2−170.

88. *Aircraft Operations Case* (1978) PSSRB file 143−2−171. See also *Economists', Sociologists' and Statisticians' Case* (1975) PSSRB file 142−2−150; *Translation Case* (1978) PSSRB file 144−2−170.

89. See Sack and Levinson, *Ontario Labour Relations Board Practice*, p. 128 ff.

90. (1969) PSSR Reports K 346 at K 349-K 350.

91. The vast majority of these votes have been conducted by mail.

92. In the *United Food and Commercial Workers Union, Local 1973, Greenwood, Nova Scotia Case* (1981) PSSRB file 146−18−188, the Board's decision merely stated that the charges of impropriety were heard, and that the conclusion was reached that they were unfounded.

93. (1971) PSSR Reports K 811.

94. The Canada Labour Code has now been amended to provide that if not less than 35 per cent of eligible voters have cast ballots, the result should be determined on the basis of the ballots cast by the majority of employees voting. It also provides that where the names of two or more trade unions appear on a ballot, and neither or none gains the support of a majority, but more than 50 per cent of the voters have cast ballots supporting all trade unions involved in the vote, the Canada Labour Relations Board must order an additional vote in which the voters are asked to vote for or against the union that previously polled the largest vote (R.S.C. 1970, c. L-1 subsecs. 128 (3) and 129 (1) and (2), as amended by S.C. 1972, c. 18). The *Finkelman Report* recommended that "the formula for determining the result of a vote set out in the Canada Labour Code be incorporated in the Public Service Staff Relations Act" (Part I, p. 232).

95. (1973) PSSR Reports K 1027, at K 1044-K 1045. The Board ordered that a representation vote be taken and ultimately rescinded its original decision.

The reclassification program undertaken by the Civil Service Commission (see p. 115, below) before the PSSRA was enacted, had not been completed at the time the Act came into force.

96. *Ibid*. at K 1046.

97. *Canadian Industrial Relations: Report of the Task Force on Labour Relations* (December 1968) (Ottawa: Queen's Printer, 1969), p. 141.

98. See Edward E. Herman, *Determination of the Appropriate Bargaining Unit by Labour Relations Boards in Canada* (Ottawa: Department of Labour, Economics and Research Branch, 1966).

99. *Making Bargaining Work in the British Columbia Public Service* (Report and Recommendations of the Commission of Inquiry into Employer-Employee Relations in the Public Service of British Columbia, 1972), pp. 26–27.

100. *Report of the Preparatory Committee*, p. 30.

An illustration of the dimensions of the problem that could arise is to be found in the fact that by 1969, seven years after President Kennedy's Executive Order 10,988 of January 1962 was issued, exclusive recognition of 2305 bargaining units had been acquired. See *Labor-Management Relations in the Federal Service: Report and Recommendations: Executive Order 11,491* (29 October 1969), p. 31. For the experience in the State of New York, see Jerome Lefkowitz, *The Legal Basis of Employee Relations of New York State Employees* (Albany, N.Y.: Association of Labor Relations Agencies, 1973).

101. *Report of the Preparatory Committee*, p. 31.

102. The situation that obtained in 1965 is described in the *Report of the Preparatory Committee*, pp. 9–10, as follows:

> At the present time, there are over 138,000 continuing positions under the Civil Service Act. They are found in about 700 classes and 1,700 grades. Some of the classes cover only one occupation: others encompass several related occupations; still others cover a number of unrelated occupations. . . .
>
> Each class has a pay plan consisting of a salary range for each grade. The pay ranges in use number approximately 320, of which about 160 have unique maximum rates. . . . [T]here are over 24,000 individuals employed under the provisions of the Prevailing Rate Employees General Regulations. They are employed in about twenty departments under job titles which, in 1963, numbered more than 1,250. Generally speaking, single wage rates for each job title are set for each locality of employment. There are also about 3,000 individuals employed under the Ships' Officers and Ships' Crews Regulations. They are employed in seven or eight departments under some 130 job titles. Their rates of pay are also locality-oriented.

103. For definition of the several categories, see PSSR Reports C1001-C1002, C1026-C1027, C1040-C1041, C1053-C1054 and C1062-C1063.

As we have seen, Bill C-28 would have added a new category — a 'managerial' category. For the effects of such a provision if the Bill had been enacted, see Chapter 2, pp. 43–44, above.

104. In 1976 an application was filed by the Treasury Board (PSSRB file 135–2–1) seeking the establishment of a special occupational category: the career-development program designed to permit Northern Indians, Inuit and Métis to acquire knowledge and skills that would fit them for positions in the public service of Canada. The application was subsequently withdrawn.

105. See Table 8 for a list of bargaining units that have been determined by the PSSRB. For a definition of each of the occupational groups, see PSSR Reports C1000-C1075.

106. See Jacob Finkelman, *The Rationale in Establishing Bargaining Units in the Federal Public Service of Canada* (Kingston, Ontario: Industrial Relations Centre, Queen's University, Reprint Series: No. 25, 1974), pp. 3 and 6. (Hereafter referred to as *The Rationale in Establishing Bargaining Units*.)

107. (1970) PSSRB file 143–2–139. See Finkelman, *The Rationale in Establishing Bargaining Units*, p. 28.

108. (1978) PSSRB files 147–2–15 and 148–2–23.

109. (1979) 2 F.C. 599.

110. *Ibid*. at 622. For a discussion of other aspects of this decision, see Chapter 2, p. 49, above and note 104 in that chapter.

111. See definition of the term 'initial certification period' in s. 2 of the PSSRA and Schedule II.

112. See statement of Dr. George Davidson to the Special Joint Committee in *The Special Joint Committee of the Senate and the House of Commons on Employer-Employee Relations in the Public Service of Canada, Minutes of Proceedings and Evidence* (Ottawa: Queen's Printer, 1966), pp. 949–50.

113. Finkelman, *The Rationale in Establishing Bargaining Units*, pp. 10–11. For a discussion of how the 'escape hatch' has been applied, see *ibid*., p. 40 ff.

114. For definition of the term 'supervisor' in U.S. federal legislation, see Chapter 2, note 82, above. Many jurisdictions in the United States deny collective bargaining rights to supervisors, and many informed observers in that country have strong reservations on that score. Even those who look with some favour on the unionization of public service supervisors are inclined to the view that supervisors should be segregated in units separate and apart from the employees whom they supervise.

See "Excerpts of Remarks by Morris Slavney" in *Governor's Conference on Public Employment Relations: A Summary of the Proceedings* (New York: State of New York, 14 October 1968), p. 7. (Hereafter referred to as Slavney, "Excerpts".)

115. In the *Ship Repair Case No. 2* (1968) PSSR Reports K 109, the employer requested that the PSSRB establish a separate unit for some, but not all, of the supervisors in the occupational group. The Board denied the request of the employer and determined that one unit including all employees in the occupational group was an appropriate unit. The ruling in that case was followed in the *Revenue Postal Operations Case No. 1* (1968) PSSR Reports K 189.

116. Supervisory and non-supervisory units were determined in the following occupational groups in the central administration: firefighters (1967) PSSRB file 146–2–2; general labour and trades (1967) PSSRB file 146–2–3); general services (1967) PSSRB file 146–2–4; ships' crews (1968) PSSRB file 146–2–5; heating, power and stationary plant operations (1967) PSSRB file 146–2–6; correctional services (1967) PSSRB file 146–2–7; lightkeepers (1967) PSSRB file 146–2–8; hospital services (1967) PSSR Reports K 6 at K 13; postal operations (1967) PSSR Reports K 64; and printing operations (1967) PSSR Reports K 65 and PSSRB file 146–2–127. In the case of the National Research Council, two units, one for supervisors and one for non-supervisors, were found appropriate for all employees in the operational category (1967) PSSRB file 146–9–14. In the same agency, supervisory employees were certified in a separate unit of certain classes of employees in the administrative support cate-

gory (see [1968] PSSRB file 145–9–108 and [1972] PSSRB file 145–9–148). The employees in those units were transferred to the Communications Security Establishment — Department of National Defence. (See Table 8, notes 66 and 71.) The PSAC was subsequently certified as bargaining agent for a unit of employees of the Communications Security Establishment which included the supervisors who had previously constituted a separate unit. (See Table 8, p. 8h.) A bargaining unit comprising the non-supervisory employees in the operational category of the Northern Canada Power Commission was found to be appropriate ([1969] PSSRB file 146–10–128); there has been no application affecting the supervisory employees of that agency.

For a discussion of the course of bargaining where the same bargaining agent was certified for both a supervisory and a non-supervisory unit in the same occupational group, see Chapter 6, p. 283, below.

117. *General Labour and Trades Case No. 1* (1967) PSSR Reports K 43 at K 46. In the *Air Traffic Control Case No. 1* (1967) PSSR Reports K 98 at K 102, the Board held that resort to the 'escape hatch' could be made only by an objecting employee organization, not by a group of individuals claiming that their interests might be ignored if they were included in a service-wide unit.

See also note 63 of Table 8, below, for a discussion of the pilotage unit.

118. Finkelman, *The Rationale in Establishing Bargaining Units*, pp. 35–36.

119. *Postal Operations Case No. 3* (1960) PSSR Reports K 120 at K 134-K 135. See note 56 of Table 8.

120. *Ships Pilots Case No. 1* (1969) PSSR Reports K 423. Note that ships' pilots are no longer under the PSSRA.

121. Finkelman, *The Rationale in Establishing Bargaining Units*, pp. 37–40.

122. (1967) PSSR Reports K 98 at K 103. See also *Quebec Air Traffic Controllers' Union Case* (1978) PSSRB file 143–2–164.

123. (1974) PSSRB file 146–2–151. See also *Heating, Power and Stationary Plant Operation Case No. 1* (1970) PSSR Reports K 607 at K 608.

124. Finkelman, *The Rationale in Establishing Bargaining Units*, pp. 17–18. See also Chapter 1, p. 3, above.

125. (1978) PSSRB file 143–2–164.

126. (1970) PSSR Reports K 607 at K 609-K 610.

127. *Aircraft Operations Case No. 2* (1971) PSSR Reports K 657.

128. See note 122, above.

129. Compare *Canadian Forces Base, Cornwallis Case*, discussed on pp. 14–15, below.

130. (1968) PSSRB file 146–2–83 and (1969) PSSRB file 146–2–106.

131. (1974) PSSRB files 150–2–4 and 150–2–5.

132. (1974) PSSRB file 146–2–151.

133. See note 123, above.

134. PSSRB files 146–2–161 and 146–2–162.

135. See p. 105, above.

136. See *National Film Board Cases* (1968) PSSRB file 143–8–45 (technical category); (1968) PSSRB file 144–8–104 (administrative and foreign service category); (1968) PSSRB file 146–8–82 (operational category); and (1969) PSSRB file 145–8–133 (administrative support category).

137. *National Research Council Cases* (1968) PSSRB files 145–9–110 and 145–9–115, where the appropriate unit comprised employees in the clerical and regulatory and the office-equipment groups.

138. For example, in (1978) PSSRB file 145–14–168, the occupational groups in the administrative support category referred to in the unit determined in the decision were the clerical and regulatory group and the secretarial, stenographic and typing group.

139. (1979) PSSRB file 145–15–175.

140. *Social Sciences and Humanities Research Council, Administrative and Foreign Service Category Case* (1979) PSSRB file 144–15–174.

141. (1980) PSSRB file 146–18–176.

142. See Financial Administration Act, subsec. 7(1) and PSSRA, s. 7.

143. See, for example, Auditor General Act, s. 18 and National Film Act, s. 13.

144. The situation is described in an unpublished address by J. Finkelman, "Employer-Employee Relations in the Public Service — The Finkelman Report: Its Impact on Classification". This address was made to the Association of Compensation and Classification Administrators, 4 October 1974.

145. See the *National Research Council Case*, discussed above, pp. 98–99. See also note 176, below.

146. (1979) PSSRB file 145–15–175.

147. The *Finkelman Report*, Part I, pp. 238–39, recommended that:

> ...where, by reason of classification action on the part of the employer, the employer or a bargaining agent alleges that the entitlement of an employee organization to represent any substantial group of employees in the Public Service is affected,

> the Board should have authority to determine whether the employees are included in any bargaining unit for which a bargaining agent has been certified, or whether they are not included in any unit.

148. It was to meet this situation that the *Finkelman Report*, Part I, p. 233, recommended that:

> ...the Board be empowered to combine existing units, the employees in which are represented by the same bargaining agent, without the need for a new application for certification, where (a) the application for such a merger is made with the consent of both parties, and (b) the Board is satisfied that the bargaining between the parties would be furthered by such a combination.

149. Slavney, "Excerpts", p. 6.

150. John T. Dunlop, "Excerpts of Remarks by John T. Dunlop" in *Governor's Conference on Public Employment Relations*, p. 11. For a discussion of the course of bargaining in a situation where the same bargaining agent represents employees in a number of units in closely related occupational groups, see Chapter 6, pp. 283–85, below. See also the account of bargaining through the National Joint Council, Chapter 5, p. 222 ff., below. Recently one reference to arbitration was made by the parties with respect to two bargaining units, the programme administration unit and the administrative services unit, and one award was issued with respect to the two units: (1981) Arbitral Awards file 185–2–244.

In this context it may be noted that British Columbia, which has opted for a single bargaining unit for the majority of its provincial public servants, seeks to recognize the interests of the several occupational groups included in that unit by providing that there are to be two collective agreements for each bargaining unit: a master agreement including all the terms and conditions of employment common to all employees in the unit, and a subsidiary agreement including the terms and conditions of employment that are to apply to a specific occupational group in the bargaining unit. The specific occupational groups are to be determined by negotiation between the parties. (Public Service Labour Relations Act, R.S.B.C. 1979, c. 346, s. 11.)

151. William E. Simkin, *Mediation and the Dynamics of Collective Bargaining* (Washington, D.C.: The Bureau of National Affairs, 1971), p. 179.

152. PSSRB *Rules and Regulations*, subsec. 41 (1). The subsection speaks of the application being made by "any person" so claiming. *Query*: Could the application be made by a person who is not a member of the bargaining unit concerned or by a person who is not a public servant? Could it be made by a person employed in a managerial or confidential capacity? See also note 159, below.

153. S. 41. Paragraph 19 (1) (*i*) empowers the PSSRB to make regulations of general application respecting:

> ...the determination of the form in which, and the time as of which, evidence . . .
>
> (iii) of signification by employees that they no longer wish to be represented by an employee organization shall be presented to the Board upon an application . . . for revocation of certification of a bargaining agent. . . .

154. *Francis A. Christian* v. *Canadian Merchant Service Guild* (1977) PSSRB file 150–2–7. The point made in the text may have to be looked at in the light of the decision of the Ontario Divisional Court in *Fisher et al. and Hotel, Restaurant, Tavern Employees Union, Local 261, Fuller's Restaurant and Ontario Labour Relations Board* (1977), where the wording of a document filed by employees in opposition to an application for certification came up for consideration. The heading of the document stated that the undersigned were "petitioning" the trade union that had applied for certification. The Ontario Labour Relations Board (OLRB) held that a document of opposition must convey a clear and unequivocal statement of desire to oppose certification, and it did not permit oral evidence to be called to amend or vary the document ([1968] OLRB Monthly Reports 395). The decision was quashed by the Divisional Court on the ground that in refusing to permit the calling of evidence to explain or clarify what had been filed or to confirm that the filing was intended to express objection, the OLRB had failed to comply with the requirement of the Ontario Labour Relations Act that the parties to any proceedings before it be given full opportunity to present their evidence and make their submissions.

The *Christian Case* was disposed of by the PSSRB without a hearing. It could be argued that the *Christian Case* is distinguishable from the *Fuller Restaurant Case* in that the document submitted to the Board in the former case appears to have been prepared for presentation to an annual meeting of the bargaining agent for the purpose of inducing the agent to meet criticism advanced by the sponsor of the document; for this reason it could not be taken as an indication that the signatories to the document intended it to be used as evidence of their desire not to be represented any longer by the bargaining agent.

155. *Gates Case* (1976) PSSRB file 150–2–2. The applicant had submitted that "a vote of the employees should be directed because he had only a relatively short time to ascertain what the wishes of the employees might be and it was difficult to communicate with employees in a bargaining unit spread across the whole country."

The PSSRB rejected this submission, holding that:

> If we were to take into account the problems that an employee seeking a declaration that certification be revoked faces in recruiting support for his application by reason of the service-wide structure of bargaining units, we would be establishing a different set of criteria for measuring support for an application for such a declaration than we would apply in measuring support for an application for certification. We do not deem it desirable to differentiate in this way between the two types of applications; they are two sides of the same coin.

156. See p. 95, above.

157. See above, pp. 85–86.

158. No case under this head has come to the attention of the Board.

159. *Ibid. Query*: Could an application on this ground be made by an employee in a bargaining unit other than the unit where he seeks revocation of the bargaining agent's certification? See also note 152 above.

160. (1970) PSSR Reports K 452 at K 460.

In the *Salomon Case* (1978) PSSRB file 150–2–6, the applicant sought revocation of the certification of the Canadian Air Traffic Control Association on the ground, among others, that the group represented by the applicant had been discriminated against because of language considerations. An application had also been made about the same time by *Le Syndicat des contrôleurs aériens du Québec* for certification as bargaining agent for a unit of air-traffic controllers under the jurisdiction of the Quebec region of the Ministry of Transport of Canada. The Board found in that case ([1978] PSSRB file 143–2–164) that the evidence failed to establish that the existing bargaining unit did not permit satisfactory representation, nor did it support an allegation of discrimination (see p. 111 above). The application for certification was accordingly dismissed; the application for revocation referred to above was subsequently withdrawn by the applicant.

161. *Cromwell* v. *United Food and Commercial Workers Union, Local 1973* (1982) PSSRB file 150–18–8.

162. Subsec. 42(2). For further discussion of these situations, see above, p. 81 ff.

163. *Ibid.*

164. See s. 44.

165. *Postal Operations Case* (1974) PSSRB files 150–2–4 and 150–2–5.

166. Under the constitution of the Council of Postal Unions, neither party could withdraw from the Council during the life of a collective agreement; afterwards a party could withdraw only on the giving of ninety days' notice prior to the expiry date. The

application for revocation was made before such notice could be given under the Council's constitution.

167. The Canadian Union of Postal Workers had made it abundantly clear to the Letter Carriers' Union of Canada that it had no intention of conducting negotiations as part of a council.

With regard to problems in this area, see the *Finkelman Report*, Part I, pp. 235–236 and Part II, pp. 44–45.

168. Subsec. 40(1). The newly certified agent has the right to serve on the employer early notice of the termination of the agreement or award. See, in this connection, Chapter 6, pp. 277–78, below.

169. S. 47. In the revocation proceeding revoking the certification of the Council of Postal Unions (see above, p. 120), the Board expressed the opinion that it could not take action under s. 47 of the PSSRA on its own motion, but that it had to await a proper application being made to it.

170. A 'successor rights' application came before the PSSRB in the *Graphic Arts Case* (1973) PSSRB file 140–2–1. A council of employee organizations had been certified and had entered into a collective agreement with the employer. Subsequently two of the constituent organizations of the council merged and formed a new organization. The council was thereupon reconstituted and applied for a determination under s. 48. The Board found that the new organization created by the merger was the successor of the two organizations that merged, and that it acquired the rights, privileges and duties, including membership in the council, that prior to the merger were vested in the two organizations. It also found that the reconstituted council acquired or retained all the rights, privileges and duties of the predecessor council as a party to the collective agreement. In addition the Board determined that a notice given by the council to the employer with a view to the renewal of the agreement was a valid and effective notice.

171. For example, Canada Labour Code, R.S.C. 1970, c. L-1, s. 144, as amended by S.C. 1972, c. 18, s. 1; Ontario Labour Relations Act, R.S.O. 1980, c. 228, s. 63, as amended by S.O. 1975, c. 76, s. 15.

172. For example, the Defence Research Board and the Fisheries Research Board were named as separate employers in Part II of Schedule A of the PSSRA as originally enacted. They were added to Part I of Schedule I (the renumbered Schedule A in R.S.C. 1970, c. P-35) by S.O.R./74-129, S.O.R./70–118 and S.O.R./71–349, respectively; that is, they were brought under the Treasury Board.

173. For example, the Medical Research Council, S.O.R./69–208, the Science Council of Canada, S.O.R./69–155 and the Office of the Auditor-General of Canada S.C. 1976–77, c. 34. Certain employees of the National Research Council, a separate

employer, were transferred to the Department of National Defence, and subsequently they were transferred to a new separate employer, Communications Security Establishment, Department of National Defence, S.O.R./75–183.

174. For example, the Professional Institute of the Public Service of Canada had been certified as bargaining agent for a bargaining unit of defence scientific officers of the Defence Research Board. On 1 April 1974 (see above, note 173), these employees were transferred to the Department of National Defence and were included in a defence scientific bargaining unit of the central administration, for which the Institute was also the certified bargaining agent.

175. Thus, when the Communications Security Establishment of the Department of National Defence was established as a separate employer, the Public Service Alliance of Canada, which had been the bargaining agent for the employees concerned before they were transferred to the new separate employer, had to apply to be certified as bargaining agent for six units of employees of the new separate employer.

176. Thus the employees who had been classified in 1967 as members of the telephone-operations occupational group were reclassified in 1976 and brought within the clerical and regulatory occupational group. The Public Service Alliance of Canada, which had been certified as bargaining agent for units consisting of each of these groups, has continued as bargaining agent for the enlarged clerical and regulatory bargaining unit.

177. See recommendations in this connection in the *Finkelman Report*, stated in note 147 above.

178. See above, Chapter 2, p. 25.

179. See, for example, Chapter 2, notes 1 and 5, above, regarding the Canada Post Corporation.

180. That is, where the new bargaining agent is certified as bargaining agent for a unit that consists of only part of the unit for which the previous bargaining agent was certified.

181. Paragraph 40(1)(*c*).

182. *Aircraft Operations Strike Declaration Case* (1979) PSSRB file 192–2–19. For a discussion of the entitlements of a bargaining agent to call or authorize a lawful strike, see Chapter 10, p. 475 ff., below.

183. See Chapter 6, p. 294, and Chapter 12, p. 631, below. We are not aware of any case in which the validity of a collective agreement has been successfully challenged on the ground that the bargaining agent has not observed the provisions of its constitution or by-laws.

184. Chapter 11, p. 565, below.

185. Subsec. 90(4). However, if an employee is included in a bargaining unit for which a bargaining agent has been certified, he may not be represented for the purpose of presenting a grievance by any employee organization other than his bargaining agent.

186. Chapter 12, p. 632 ff., below.

4: *Scope of Bargaining and Related Matters*

General Principles

The essence of collective bargaining is bilateral determination. "By its very nature, bilateralism involves a dilution of the authority of the employer over the terms and conditions of employment. To the extent that matters affecting the employment relationship are brought within the scope of bargaining, joint decision-making by the parties to the bargaining relationship replaces the unilateral authority previously exercised by the employer."[1] In the private sector, over the years since the Wagner Act — the ancestor of labour-relations legislation as we know it today, not only in the United States, but in Canada as well — first became law, the scope of bargaining, that is, of shared decision making, has been progressively broadened until today it is fair to say that little is excluded from the legitimate scope of bargaining; in short, practically every circumstance of employment is 'bargainable'. "The major issue at the public bargaining table is the same as it is in the private sector: more wages, fringes and economic benefits. However, public employee unions are also seeking to use collective bargaining as a means of effectuating social change and for determining public policy questions."[2]

A Policy Dilemma

To what extent can the public service employer commit itself to bargain on matters of public policy? The employer finds itself in the following dilemma:[3]

> ...the role that the government plays as employer is at times bound to conflict with its role as governor. As employer, the government is a party to the setting of terms and conditions of employment for its employees while, as governor, it has ultimate responsibility for, and supreme authority over, the ordering of affairs within its jurisdiction. . . . government as governor, often does establish legitimate public policy that will affect the terms and conditions of employment of its employees. . . .
>
> ...Public employees, through collective negotiation, have obtained the means by which they can vigorously pursue legitimate employee goals, which may at times conflict with public goals. Government, as a party to a collective bargaining relationship, finds that the wide managerial powers that it formerly enjoyed have been narrowed. The reduction of managerial power means that, even though government is still supreme as governor, it no longer enjoys the same supremacy as employer. The concern, of course, is that collective bargaining by restricting the government's role as employer will spill over and affect the general power of government. . . .
>
> Legal structures established to regulate public sector collective bargaining reflect the fundamental tension caused by the conflict of these two roles of government.

To separate matters in the public sector that ought to be bargainable from those that should not be bargainable is not an easy task. Thus some matters may be legitimate subjects of collective bargaining to the extent that they are aspects of the work-load that employees may be required to perform, but the question arises whether they should be bargainable when presented by the bargaining agents as an aspect of what constitutes good public policy.[4] For example, case-load for social workers may come under the first head from one point of view, but under the second head if the objective sought by the bargaining agent is, say, the establishment of a certain quality of service for indigents.

Sovereignty of Parliament

One overriding principle that must be recognized at the very outset, before we turn to an examination of specific statutory provisions, is that the 'government as employer' cannot bind itself, under our parliamentary system of government, to refrain from introducing legislation that may conflict with the terms of a collective agreement with its employees.[5] The likelihood that such legislation would be introduced in the federal jurisdiction, except in the most extraordinary circumstances, is not very great since the executive authority that negotiates and enters into a collective agreement forms an important part of the policy-making branch and is usually in control of the legislative branch as well. Nevertheless, we must not close our eyes to the fact that circumstances may arise that make it imperative for government to introduce legislation that would invalidate or make non-operational provisions of a collective agreement arrived at through the bargaining process required by the applicable collective bargaining legislation. Such circumstances did arise in 1975, when the Anti-Inflation Act was passed, and more recently, in 1982, when the Public Sector Compensation Restraint Act became law. The impact of both these statutes, especially the latter, on the collective bargaining process is discussed in some detail in several portions of this study.

Some collective agreements make express provision for a situation where Parliament passes legislation that invalidates a term of a collective agreement. For example, the collective agreement of 9 February 1982 between the Public Service Alliance of Canada and the employer of the employees in the clerical and regulatory unit declares that "In the event that any law passed by Parliament, applying to public servants covered by this agreement, renders null and void any provision of this Agreement, the remaining provisions of this Agreement remain in effect for the term of the Agreement." The collective agreement of 1 August 1980 for employees in the electronics unit, between the employer and the International Brotherhood of Electrical Workers, Local 2228, provides that "If any law now in force or enacted during the term of this Agreement renders null and void any provision of this Agreement, the remaining provisions shall remain in effect for the term of the Agreement. The parties shall thereupon seek to negotiate substitute provisions which are in conformity with the applicable law."[6] It should be pointed out that in view of the provisions of the Public Sector Compensation Restraint Act, any discussion of the scope of bargaining as it may be applicable during the period that the Act remains in force becomes, for most practical purposes, an academic exercise. In what follows in this chapter, we are still dealing with the situation as it was before the enactment of that statute, a situation to which it is anticipated the parties will return in due course.

Limitations on the Scope of Bargaining

The first source one must look to in seeking to ascertain the scope of bargaining under a particular statute is the definition of the term 'agreement' or 'collective agreement' if such a definition is to be found in the relevant act. Section 2 of the Public Service Staff Relations Act (PSSRA) defines the term 'collective agreement' as "an agreement in writing entered into under this Act between the employer, on the one hand, and a bargaining agent, on the other hand, containing provisions respecting terms and conditions of employment and related matters".[7]

The definition contained in the statute must be read, however, subject to a number of exclusionary provisions. The PSSRA, subsection 56(2), states:

> No collective agreement shall provide, directly or indirectly, for the alteration or elimination of any existing term or condition of employment or the establishment of any new term or condition of employment,
>
> (*a*) the alteration or elimination of which or the establishment of which, as the case may be, would require or have the effect of requiring the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating moneys required for its implementation, or
>
> (*b*) that has been or may be, as the case may be, established pursuant to any Act specified in Schedule III.

The statutes listed in Schedule III are: Government Employees [Workmen's] Compensation Act[8], Government Vessels Discipline Act,[9] Public Service Employment Act,[10] and Public Service Superannuation Act.[11] The distinction between the situations that fall under paragraph (*a*) and those that fall under paragraph (*b*) of the provision quoted above is dealt with in the terms of reference to the conciliation board in the *Air Traffic Control Case*:[12]

> ...it was the intention of Parliament that the construction to be placed on paragraph (b) is different from the construction that is to be placed on paragraph (a). The language of paragraph (b) "protects" not only terms and conditions of employment that are governed by the four statutes themselves, but also any term or

> condition of employment that has been established pursuant to those statutes or that may in the future be established thereunder, i.e., by regulation or otherwise. . . . Paragraph (a) . . . cannot be read as "protecting" terms or conditions that are established pursuant to the statutes that come within [that] paragraph, but only terms or conditions the alteration or elimination of which, or the establishment of which, would be contrary to *the provision* of any particular statute as enacted by Parliament.

The limitations quoted above on the scope of bargaining under the PSSRA are reinforced by provisions which declare that the limitations apply to a report of a conciliation board (subsection 86[2]) as well as to an arbitral award (subsection 70[2]). In addition the Act, presumably for greater certainty, lists in subsections 86(3) and 70(3) a number of matters that may not be included or dealt with in a report of a conciliation board or an arbitral award, but that also appear to fall within the limitations already discussed. These are "standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees". Finally, in this connection, where a bargaining impasse is left to be resolved by arbitration, subsection 70(1) of the PSSRA declares that the "arbitral award may deal with rates of pay, hours of work, leave entitlements, standards of discipline and other terms and conditions of employment directly related thereto." As we shall see, it has been held that only the matters described in that subsection may be dealt with in an arbitral award.[13] The legal impact of these limitations on the bargaining process will be discussed at length later in this chapter.

A provision of the PSSRA that at first sight may not appear to have any relevance to the scope of bargaining — indeed, it has not been invoked in connection with the scope of bargaining up to this time — must nevertheless be mentioned at this point because of its possible impact on the collective bargaining relationship. Section 112 provides that:

> (1) Nothing in this or any other Act shall be construed to require the employer to do or refrain from doing anything contrary to any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.
> (2) For the purposes of subsection (1), any order made by the Governor in Council is conclusive proof of the matters stated therein in relation to the giving or making of any instruction, direction or regulation by or on behalf of the Government of

> Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

The collective agreement entered into on 1 August 1980, between the employer and the International Brotherhood of Electrical Workers for the employees in the electronics bargaining unit states that "Nothing in this agreement shall be construed to require the Employer to do or refrain from doing anything contrary to an instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada."[14]

'Protected' Authorities

Some statutes 'protected' by the provisions quoted above concern important matters of public policy and public interest. Others deal with matters that in the private sector are usually regarded as coming within what is commonly known as 'the doctrine of management's reserved rights'. "This doctrine states that in the first instance (before collective bargaining) except as restricted by law, management's authority is supreme in all matters affecting the employment relationship."[15] However, the employer may agree to share this authority or any part of it with an employee organization and may enter into a written binding instrument restricting the authority he previously possessed. Under the view generally, but not universally, held in Canada, any portion of the employer's supreme authority that is not made subject to shared decision making in the collective bargaining process is retained by the employer.[16]

In the public service some aspects of the authority that in the private sector are regarded as part of management's reserved rights, are governed by laws enacted by Parliament or a Legislative Assembly. The 'government as employer' is understandably reluctant to enter into a binding agreement to restrict, limit or amend these rights. Indeed, in some instances, authority over certain matters has been vested in agencies, such as public service commissions, that are independent of the 'government as employer'. Thus, under the federal Public Service Employment Act, appointment (including promotion), the prescription of selection standards, probation, lay-off, and reappointment (recall) are some of the matters entrusted to the Public Service Commission.[17] In addition the PSSRA, section 7, contains a 'management's reserved rights' clause. It declares that "Nothing in this Act shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein."[18]

Special Inclusionary Provisions

There are a number of matters that may perhaps be regarded as not falling strictly within the expression 'terms and conditions of employment' that are nevertheless subject to bargaining under the PSSRA. We shall now proceed to examine briefly the provisions of the Act with respect to these matters.

Most jurisdictions in Canada make special provision regarding the process for resolving grievances that may arise during the lifetime of a collective agreement. Sections 90 and 91 of the PSSRA confer on employees a statutory right to present grievances on a wide variety of matters and to carry certain types of grievance to third-party determination (adjudication). As we shall see in Chapter 11,[19] the parties are entitled to include in a collective agreement provisions relating to the procedure for presenting grievances, but the procedure relating to third-party determination of grievances is reserved exclusively for the PSSRB.[20]

Special provision is made in the PSSRA relating to the inclusion in a collective agreement of a 'union security' clause. As we shall see,[21] sections 8 and 9 of the Act prohibit both discrimination against persons on the ground of union membership and discrimination against an employee organization. The first of these prohibitions is subject to the exception that a collective agreement may contain a valid union-security clause that may require an employee who voluntarily becomes a member of an employee organization to remain a member during the lifetime of the agreement: that is, a 'maintenance of membership' clause.[22]

Finally, in dealing with what might be described as the 'inclusionary aspect of the scope of bargaining', section 57 of the PSSRA requires the bargaining parties to stipulate the effective date and the term for which any agreement arrived at is to operate, and declares that where the agreement contains no such stipulation, or where it is in force for a term of less than one year, it is to be deemed to be in force for a term of one year.

The duration of an arbitral award is not left to the discretion of the bargaining parties. Section 73 of the PSSRA provides that the term of an award is to be specified in the award, and the award is to be operative for not less than one year or more than two years, subject to certain provisions, irrelevant here, that allow for a degree of flexibility.[23]

Rulings with Relevance for Scope of Bargaining

Where it is alleged in a proceeding before the PSSRB that a party, by refusing to bargain on a certain issue, has failed to observe the obligations imposed on it by section 50[24] of the PSSRA to bargain in good faith and to make every reasonable effort to conclude a collective agreement, the Board may be called on to deal with the question of whether that issue is bargainable. There has so far been only one case in which the issue of 'bargainability' has been canvassed by the Board in such a proceeding. In the *Medicare Case*, the Board held that a group surgical-medical plan made available to employees on certain conditions was a term or condition of employment, even though access to the plan was optional for employees.[25]

Rulings that have significance for the scope of bargaining may also be made in arbitral awards or in terms of reference to conciliation boards. In such proceedings the deciding authority (formerly the Arbitration Tribunal and now the PSSRB or its Chairman) is required, when a bargaining party objects to a proposal, to determine whether the proposal is within the jurisdiction of the PSSRB or within the jurisdiction of a conciliation board. The ground for the objection may be that the matter is barred by subsection 56(2) of the PSSRA, which deals with exclusions from the scope of bargaining; or it may be that the matter is expressly excluded from those issues that may be dealt with in an arbitral award by the operation of subsection 70 (1) or 70 (3), or that a conciliation board is prohibited by subsection 86(3) from making a recommendation with respect to the issue. The range of matters that may be dealt with in an arbitral award under subsection 70(1) is narrower than the range of matters that are bargainable under the PSSRA. As Jackett C.J. said in *Professional Institute of the Public Service of Canada and the Public Service Staff Relations Board*,[26] a particular matter may not be the subject of arbitration under the PSSRA "even though it might be included in a collective agreement by agreement of the parties." Thus, in those instances in which the employer has been disposed to challenge the arbitrability of some matters, a bargaining agent that has specified reference to arbitration as the applicable dispute-resolution process has had to bargain under constraints that do not apply when a bargaining agent has specified reference to a conciliation board as the end process.

An examination of the provisions of collective agreements entered into by bargaining agents that have specified the arbitration route does not lead one to conclude that those bargaining agents have failed to persuade the employer to agree to proposals on many matters that do not come within the confines of subsection 70(1) of the PSSRA. However, if an impasse in bargaining is reached, it would be unrealistic to assume that in dealing with a proposal by a bargaining agent that the employer believes is not arbitrable, the employer would be as 'open-handed' in every case as it might be if the proposal were one made by a bargaining agent that had opted for the other process.[27] In a real sense, then, the scope of bargaining where arbitration is the end process may be considerably narrower than it is under the conciliation-board process. However, bargaining agents have come to believe that the constraints on bargaining under the arbitration option are, in some respects, actually greater than they are under the conciliation option because of the way in which some arbitral awards are worded. At times, but not invariably, the Arbitration Tribunal in the early days, and in recent years the PSSRB, in holding that a certain proposal was not arbitrable, have been disposed to rest their decision solely on subsection 70(1). (This will become evident in Chapter 10, below.) In quite a few instances, a proposal disposed of in this fashion related to a matter that was also non-bargainable by reason of subsection 56(2). The reliance on subsection 70(1) has often led bargaining agents that have specified arbitration as the applicable dispute-resolution process to attribute the rejection of a proposal to limitations on the scope of arbitration in the PSSRA, rather than to limitations on the scope of bargaining that are equally applicable to proceedings under the conciliation-board option for dispute resolution. The misgivings of the bargaining agents operating under the arbitration option have been heightened by the practice that has developed[28] of referring to a conciliation board, with a caveat, some matters that lie in a grey area or that clearly may not even be the subject of bargaining.

In the remainder of this chapter, we shall examine various proposals, made in the course of bargaining, where the arbitrability or referability has been challenged by one or other of the parties, usually the employer. Where a matter is ruled arbitrable or referable, it would follow that it comes within the scope of bargaining under the PSSRA.[29] However, where a matter is ruled not arbitrable or referable (or referable only subject to a caveat), it may not follow that it could not be included in a collective agreement by mutual consent.

Before embarking on an examination of rulings that have been made concerning specific proposals, two principles of general application must be examined.

Limitations on Arbitrability

At one stage bargaining agents took the position that subsection 70(1) of the PSSRA did not contain an exhaustive definition of matters that might be the subject of an arbitral award. They contended that anything that might form part of the subject matter of a collective agreement was arbitrable unless the matter came within the exclusionary provisions discussed above. In a series of cases,[30] the PSSRB rejected this contention. In the *Actuarial Science Case* the Board said:

> In the opinion of the Board, the only issue that is arguable by parties to arbitration is whether a proposed term or condition of employment which is a subject of dispute is one that falls squarely within the cited subject matters in subsection (1) of section 70 [of the PSSRA] and, if not, whether such matter in dispute is or is not "directly related" to any one or more of these four subject matters.

An application to the Federal Court of Appeal to set aside the PSSRB's decision in one[31] of this series of cases was dismissed.[32] In his decision Jackett C.J. said:

> It does not seem to me that there is any doubt that the statute expressly limits arbitral awards to the matters described in section 70(1). I am, therefore, of opinion that no other matter can be the subject of arbitration under the [PSSRA] even though it might be included in a collective agreement by agreement of the parties.

Although the Public Service Arbitration Tribunal and the PSSRB have had occasion over the years to determine whether certain matters referred to arbitration fall within the 'terms and conditions of employment directly related' to the four matters specifically listed in subsection 70(1), it was not until 1980 that the courts were called on to interpret these matters. In the *Purchasing and Supply Case*[33] the Board had included in an award a provision that on failure of the employer to renew a specified term appointment, the employee concerned should, in certain circumstances, be deemed to be laid off within the meaning of a clause in the collective agreement relating to severance pay. On application to the Federal Court of Appeal,[34] this provision of the award was set aside. Heald J. held that the provision did not deal with rates of pay. He said:

> The kind of question which I think is contemplated under section 70(1) when "rates of pay" are referred to, is a question as to whether the present pay rate of employees should be increased, decreased or left at the present rate, or for example, a question of call-back, overtime, shift premiums, holiday pay and the like. An arbitral award could deal with such questions under section 70(1) but not a question such as the one in this case where the issue to be resolved, rather, involves the circumstances under which "severance pay" is payable.

In the *Office Equipment Case*,[35] where, again, the issue of severance pay was involved, the PSSRB sought to distinguish the situation that came to light from the one that had been dealt with by Heald J. in the case referred to above. In its reasons for decision, the Board said:

> ...the finding by Heald J. that the Board has jurisdiction to make an award of rates of pay, in cases of call-back, overtime, shift premiums and the like [is] no less the circumstances under which a rate of pay is payable than is severance pay in case of lay-off, resignation, rejection on probation, retirement or death or indeed release under Section 31 [of the Public Service Employment Act]. . . .
>
> In the context of Section 70(1), "rates of pay" may be interpreted as encompassing the various circumstances which entitle an employee to a rate of pay. One cannot, in a practical sense, divorce the entitlement to a rate of pay from the circumstances which give rise to the entitlement. They are two sides of the same coin.
>
> ...severance pay is a benefit earned by an employee during the performance of his work. Therefore, the circumstance of his earning the severance pay benefit is all the time worked by him. The circumstances of his entitlement to payment of these accrued earnings [are] a term or condition of employment directly related to the earnings of the severance pay benefit during the continued past performance of work.
>
> ...In adding the words "and other terms and conditions of employment directly related thereto", Parliament obviously intended to enlarge, rather than narrow, the interpretation to be given the few generic matters mentioned in Section 70(1). This view of Parliament's intention is self-evident. The Board is of the opinion that it was intended to ensure that the Board will give broad, practical, and meaningful interpretation to the scope of its jurisdiction.

The Board held that it did have jurisdiction to deal with a proposal by the bargaining agent concerning severance pay. On an application by the employer to the Federal Court of Appeal to review and set aside this decision in *The Queen and Public Service Alliance of Canada*,[36] the Court, in a unanimous decision from the bench, dismissed the application and held that the Board did have "jurisdiction to include in the collective agreement, as part of the provisions for what is referred to as 'severance pay', [a] clause ... providing for payments in addition to the regular pay of employees on their release from employment pursuant to section 31 of the *Public Service Employment Act*." The earlier court decision was distinguished, as it had been by the Board in the *Office Equipment Case*, on the ground that it dealt with a particular situation in which "the substance of the payment called severance pay was not pay for services rendered but compensation in respect of the non-renewal of a term position."

Various aspects of career development were among other issues that remained in an equivocal state until 1979. In the *Computer Systems Case*,[37] in 1971, the Arbitration Tribunal stated that even if the employer was justified in considering career and training leave as falling within its 'prerogatives' (as opposed to 'entitlements'), once the employer had decided to avail itself of these so-called 'prerogatives' and had come to an understanding to include these subjects in a collective agreement, any issue pertaining to 'leave entitlements' that derived from these career-development and/or training clauses fell within the jurisdiction of the Tribunal. Indeed, in a number of later cases, career-development provisions had been included in awards without the employer's objection.[38] However, by the earlier part of the 1970s, strong employer resistance to such proposals began to surface, possibly because the employer came to look on the reasoning of the Tribunal in the *Computer Systems Case* referred to above as meaning that if the employer conceded any point on career development, the PSSRB would have authority to deal with other aspects of that matter. In a number of cases, the Board upheld the employer's objection.[39] In the *Architecture and Town Planning Case*[40] the Board rejected on jurisdictional grounds a proposal by the bargaining agent that all employees in the bargaining unit should have equal opportunity to avail themselves of the provisions of the collective agreement regarding career development. When application was made to the Federal Court of Appeal, the Court held,[41] without giving reasons, that the proposal of the bargaining agent did lie within the jurisdiction of the Board under subsection 70(1) of the PSSRA.

In some instances bargaining agents have proposed that the employer undertake to engage in consultation with the bargaining agents on a variety of matters during the term of a collective agreement. Some of the matters on which consultation was sought were themselves arbitrable, that is, they came within subsection 70(1) of the PSSRA; others were not. In the *Communications Case*[42] the Tribunal held that a proposal of the bargaining agent calling for consultation on outside employment, job security, contracting-out, and statement of duties did not come within subsection 70(1); it made no comment concerning whether the subject matters on which consultation was to take place were 'excluded' under subsections 70(2) and (3) of the Act. In the *Commerce Case*[43] the PSSRB held that a proposal by the bargaining agent calling for the parties to engage in consultation about hours of work and to consider the practicability of instituting variable work schedules was not arbitrable. The Federal Court of Appeal, on an application for review of the Board's decision, held, again without giving reasons, that the proposal did fall within the Board's jurisdiction under subsection 70(1).[44] Since 'hours of work' is an arbitrable item under that subsection, it follows that the Court's decision applies to consultation about the generic matters listed in the subsection. In several earlier decisions, the Tribunal had held that consultation on matters that clearly did not fall within the listed matters was not arbitrable. In the *Purchasing and Supply Case*[45] the employer objected to a proposal by the bargaining agent that the employer should consult meaningfully with the representatives of the bargaining agent about contemplated changes in working conditions not governed by the agreement on the ground that such consultation would cover conditions outside the restriction of section 70. The Tribunal upheld the objection.

In the *Defence Research Board Case*[46] a proposal that procedures concerning appointment, promotion, transfer and demotion of employees during the life of the agreement should be established in consultation with the bargaining agent was held not to be referable as infringing on the jurisdiction of the Public Service Commission under the Public Service Employment Act. It is submitted that the decision of the Federal Court of Appeal referred to earlier should not be considered as making arbitrable proposals for consultation on such matters.

Management's Reserved Rights

The second of the two principles mentioned earlier relates to the impact on the scope of bargaining of the provisions of section 7 of the PSSRA. In the terms of reference to the conciliation board in the *Postal Operations Case*[47] in 1968, the Chairman of the PSSRB, after noting that some matters comprehended in section 7 were also dealt with in subsections 56(2) and 86(2) and (3) of the Act, stated:

> To the extent to which a matter that falls within section 7 is identical with a matter to which any of the . . . subsections just referred to apply, that matter cannot be included in the terms of reference. In so far as any other matter that falls within section 7 is concerned, there is no express prohibition against its inclusion in terms of reference. The section declares in unequivocal terms that nothing in the Act is to be construed to affect the right or authority of the Employer to do certain things. In other words, even if the Employer were to enter into some stipulation with regard to these matters, it would be free in law to repudiate the stipulation the very next day. If the Employer were to agree to include in a collective agreement a provision that limited its right or authority say to classify positions in the Public Service, it would not be bound by that provision.

However, the Chairman then went on to make some comments that have since been repeated in many terms of reference. The Chairman commented:

> The Employer may nevertheless be prepared to give an undertaking to a bargaining agent that it would exercise its authority in respect of the matters listed in section 7 in a certain manner as evidence of its good faith and in the interest of promoting good industrial relations. The giving of such an undertaking may indeed, in some instances, be of considerable value in inducing a bargaining agent to accept terms or conditions which it might otherwise be reluctant to accept. Under subsection (1) of section 84 of the Act, the primary responsibility of a conciliation board is to endeavour to bring about agreement between the parties in relation to matters set forth in the statement of the terms of reference. In its endeavours, the conciliation board ought not to be barred from discussing with the parties anything that may enable the members of that board . . . working out an accommodation between the parties and this would include matters that fall within the ambit of section 7. I see no reason why, in its report, the Conciliation Board may not make recommendations concerning any of these matters, provided of course that (a) the recommendations do not touch matters specified in subsection (2) of section 56

> and subsection (2) of section 86, and (b) the recommendations are so worded as to make it abundantly clear that they do not call for the inclusion in the collective agreement itself of anything relating to what I shall refer to for convenience as residual matters under section 7.

These comments may have had a significant effect on the bargaining process in that undertakings and stipulations that have been included in collective agreements or given by the employer when a collective agreement was entered into may perhaps have gone beyond the provisions regarding scope of bargaining set out in the PSSRA.

Many non-bargainable matters have been referred to conciliation boards over the years with the caveat expressed in the comments quoted above. Views differ concerning the wisdom of this approach to the problem of referability. Bargaining agents believe that the approach has contributed significantly to the resolution of bargaining impasses. Spokesmen for the employer are of the opinion that it creates expectations that may not be capable of realization under the legislation as it stands, and that it leads members of conciliation boards to make recommendations that may not pay sufficient heed to the caution expressed in the terms of reference. Since there is no practical way to prevent such recommendations being included in a report of a conciliation board,[48] they say that the recommendations acquire an aura of validity that may induce the employer to make concessions that, to say the least, fall into a grey area and may cause tension in the relationship between the employer and other bargaining agents.[49]

From an examination of arbitral awards and terms of reference, it is evident the bargaining agents have been disinclined to accept earlier rulings that a certain matter is not arbitrable or referable. Time and time again, bargaining agents have repeated, in subsequent rounds of bargaining, proposals that have been held non-arbitrable or non-referable in earlier cases. In some instances a proposal has been modified slightly in a new round of bargaining in the hope that it might prove acceptable. But in other instances a proposal in a new round has been couched in the identical terms in which, in a previous round, it was proposed and rejected on jurisdictional grounds. There can, of course, be no objection where this has occurred following a decision of the courts on a certain issue that reverses the conclusion reached by the PSSRB. However, the approach of the bargaining agents is a cause of concern where no such situation exists. Repeated rejection of non-arbitrable or non-referable matters, as is bound to follow in such situations, creates the impression that the PSSRB or its Chairman is insensitive to the interests of the employees. On the other hand, as we have already noted,[50] in recent years the employer has begun to take a harder line and has challenged the arbitrability or referability of proposals that had actually been included without objection in previous agreements for the same unit or were similar to those that had been included in earlier agreements for other units. Such an attitude does little to promote a satisfactory bargaining relationship.

Rulings on Selected Matters

Up to this point we have been examining the scope of bargaining in general terms. The subject may also be looked at from another angle, that is, by examining a select number of matters that are usually treated as bargainable under the general labour-relations legislation, but concerning which one or other of the parties, usually the employer, contends that a matter may not be arbitrable or may not be referable to a conciliation board. In this connection it may not be amiss to repeat in summary what has been evident from the earlier discussion in this chapter. Where a matter is ruled arbitrable, it follows that it is bargainable. On the other hand, where a matter is ruled non-arbitrable, it does not necessarily follow that the matter is not bargainable; it may have been rejected on the ground that it does not come within the limits for an arbitral award fixed by subsection 70(1). If a matter is referable to a conciliation board, it is also bargainable. Generally speaking, if a matter is not referable, it is not bargainable.

Rates of Pay and Related Matters

As we pointed out earlier,[51] it would now appear that the phrase 'rates of pay' in subsection 70(1) of the PSSRA encompasses, not only a question whether an existing rate of pay of employees should be increased, decreased or left the same, or a question of call-back, overtime, shift premium or the like, but also the circumstances that give rise to the entitlement to payment. A contention of the employer was rejected that only the amount of time worked and the type of duties performed as reflected in the classification of the employees be taken into account in considering whether a proposal of a bargaining agent was directly related to rates of pay. It has been held that pay for a statutory holiday not worked, allowances for travelling time on government business,[52] a penological factor allowance, and a bilingual differential are all matters that come within the scope of an arbitral award under subsection 70(1) of the PSSRA. In the *Administrative Services Case*[53] the PSSRB said that the penological factor allowance is

> ...an amount of pay to which employees are entitled for services rendered while occupying positions which have certain characteristic duties involving to varying degrees the control, direction and custody of inmates in Federal Penitentiaries.
>
> In our view what is provided is a special rate of pay or higher rate of pay determined on the basis of the environmental factors to which the employee is exposed in rendering the services required in his position and the higher degree of responsibility involved.

In the *Secretarial, Stenographic and Typing Case*[54] the Board said:

> ...the incumbents of a position which requires the employee to possess additional qualifications and more diverse skills than the incumbents of technically similar positions whose qualifications permit them to perform their duties and responsibilities in only one of the official languages [are] entitled to a differential in pay for those reasons. It is consistent with general personnel compensation practice to establish relatively higher rates of pay or a special allowance for positions requiring identifiably greater qualifications and more diverse skills.

However, the Board did not make an award establishing the amount of the differential because, it said, it had neither the evidence nor the skill required to establish the extent of such a differential. It therefore suggested that the parties request the Pay Research Bureau to survey the practice relating to compensation for bilingualism in the outside sector. The Board noted in its decision in the *Administrative Services Case* that although a request had been made, the parties subsequently agreed to discontinue the survey, and it urged the parties to proceed with the assembly of the relevant data. In the *Office Equipment Case*[55] the bargaining agent sought the inclusion in the award of a provision for the payment of a bilingual differential in the same amount and under the same conditions as had previously been established by unilateral decision of the employer. The Board decided that the proposal of the bargaining agent should be incorporated in the award "as a spur to the parties to again request the Pay Research Bureau to obtain the relevant market data in order to determine this matter on a rational basis before it again becomes a source of tension between the parties." A proposal for a bilingual bonus has also been held referable to a conciliation board in the *Data Processing Case*.[56]

Acting pay (that is, an increase, after a specified period, in an employee's rate of pay upon his being assigned to duties of a higher classification level) has been held to be directly related to rates of pay and not to involve promotion of the employee to a higher position.[57] However, a proposal that an employee whose position had been downgraded as the result of reclassification should continue to be paid at the rate of pay corresponding to his former level was held non-arbitrable because it trenched on the employer's authority to classify positions.[58]

Proposals that defined levels of education for the purposes of entitlement to higher rates of pay and indicated the times when such entitlements should take effect were treated as referable.[59] But a proposal for an extended range of rates for scientific advisers (food and drug) of the Fisheries Research Board was found non-arbitrable since the extended rates would have the effect of establishing a new classification of employees, and classification is not subject to arbitration.[60]

Performance pay (that is, increments in pay based on evaluation of an employee's performance according to a scale ranging, say, from 'acceptable' to 'outstanding') has presented a problem in arbitration proceedings. That a well-framed and well-administered merit system of pay is desirable has been recognized by the employer, for it has often proposed provisions relating to performance pay that should be included in an award. As one would expect, bargaining agents have also referred performance pay to arbitration. However, it has been held that since performance pay involves appraisal of employees,[61] neither the proposal of the employer nor that of the bargaining agent can be dealt with in an arbitral award.[62] The same principle applies to the referability to a conciliation board of a proposal regarding performance pay.[63] The Public Sector Compensation Restraint Act, as originally introduced in the House of Commons, contemplated that performance awards, merit increases and incremental increases would remain untouched by the limitations on wage rates imposed by the Act. However, by an amendment in the Miscellaneous Estimates Committee, embodied in the legislation (in subsection 6[5]) as finally enacted, such emoluments are to be withheld from employees whose salary range, as of 28 June 1982, has an annual maximum that equals or exceeds $49 500. This restriction is to apply for the duration of the period to which the wage-restraint provisions are applicable in any particular case.[64]

From the early days of the operation of the legislation, arbitral awards had included provisions requiring, in defined circumstances, the payment to an employee of severance pay, that is, an amount in addition to his regular wage rate in the event that he resigned, retired or was laid off,[65] or an amount payable to the estate of an employee in the case of his death.[66] Then, in 1980, a decision of the Federal Court of Appeal, referred to above, cast doubt on the rulings that had been made previously. However, these doubts were set aside by a later decision of the Federal Court of Appeal, also referred to above,[67] which upheld the PSSRB's position that severance pay is "an additional earning while performing work . . . accruing while working . . . payable on the occurrence of an event such as retirement, death, release or lay-off at a rate per year of service depending on agreement by the parties or the decision in an arbitral award."[68]

Proposals that the employer provide for an employee a free parking space at his place of employment,[69] that an employee, on being transferred, be reimbursed for the cost of his home,[70] and that the employer undertake not to increase rentals for residential accommodation occupied by an employee in isolated locations and to provide employees with free utilities[71] have been held referable.

A proposal that persons who had ceased to be employees during the period of bargaining for a new agreement should receive retroactive increases provided for in an agreement or award has been held non-arbitrable[72] and non-referable.[73]

Because of delays that have occurred in the implementation of retroactive pay changes and in payment for overtime, bargaining agents have often sought to bind the employer to make such payments within specified periods[74] or to pay interest on delayed payments.[75] Proposals of this nature have been held non-arbitrable since the period for implementation of an award is fixed by section 74 of the PSSRA.[76]

Several proposals that the employer reimburse employees for membership or registration fees payable to a professional association of which an employee is a member have called for decision. At first such proposals were held non-arbitrable.[77] More recently, however, the previous approach has been modified. It has been held that such a proposal was arbitrable if membership in such an association was *required* by the employer to enable the employee to perform the duties of his position, whether or not the need to be a member of the association was a legal (that is, licensing) requirement.[78] However, this ruling does not extend to reimbursement of membership fees in an association that provides an employee an opportunity for professional contact with other persons concerned with the employee's departmental operations.[79] A proposal that the employer set aside a certain sum of money to enable employees to attend and participate in conferences and seminars for the purpose of maintaining high professional standards, and that the fund be distributed equitably among employees in the bargaining unit was held non-arbitrable.[80]

A proposal for the indemnification by the employer of an air-traffic controller against the payment of damages that may be assessed against him in a civil action arising out of his carrying out his duties was held referable.[81] So also was a proposal that the employer provide comprehensive malpractice protection and third-party liability protection for nurses on on-duty-in-travel status;[82] the PSSRB cautioned, however, that if the conciliation board made any recommendation with respect to this proposal, it was not to contravene the Crown Liability Act.[83]

Hours of Work and Related Matters

The term 'hours of work' has been held to comprehend, not only the hours of work on a specific day, but also the hours during which work is done in any specified period of time, whether it be a day, a month or any other period, as well as the sequence in which hours are to be worked.[84] Proposals that sought to establish what should constitute normal hours of work and the sequence of days or hours of work during any given period of time have been held arbitrable and referable.[85] Bargaining agents have repeatedly proposed reductions in daily and weekly hours of work. In the *Clerical and Regulatory Case*[86] the Tribunal reluctantly denied a request for such a reduction, undoubtedly because of the problems that would arise if the matter were dealt with on a unit-by-unit basis. However, the chairman of the Tribunal, Mr. Justice André Montpetit, wrote to the parties in that case:

> Notwithstanding the ruling made in the . . . award on hours of work, the Tribunal strongly suggests that the authorized represen-

> tatives of all the employees within the Public Service and the representatives of the Employer jointly (or otherwise) study *more fully and more adequately* all the implications of a reduction in the said employees' work week without unreasonable delay.

In the *Administrative Services and Program Administration Case*,[87] the PSSRB refrained from making an award to reduce hours of work only on the representation that the matter was "under active and urgent review". No progress appeared to have been made in this regard for some time, although the letter cited above was quoted again and again in arbitral awards, and the same suggestion made. In the *Office Equipment Case*,[88] the Board noted that "nearly nine years have passed since Justice Montpetit urged that this issue be addressed 'without unreasonable delay'."

Finally, in the *Financial Administration Case*,[89] the PSSRB came to the conclusion that it could no longer await review of the situation by the parties, and it issued an award providing for the reduction of hours, but set the effective date of the award forward about a year. In stating its decision, the Board made the following comment: "Notwithstanding this award, the Board wishes to reiterate the view that it is preferable for the parties to continue their efforts to address and jointly resolve the question of a reduction in hours of work in a practical and realistic manner." However, in the *Economists Case* of 1981,[90] the Board, given the circumstances, denied a proposal for reduction of hours, but again recommended that the parties continue their efforts to resolve the question.

A problem has arisen in connection with proposals for flexible hours. In the *Economists Case* of 1974,[91] the PSSRB overruled part of an award made by the Arbitration Tribunal. That part provided that an employee, with the concurrence of his supervisor, could complete his weekly hours of employment other than in five full days in each seven-day period and that his normal work day was to be scheduled as agreed between him and his supervisor. The Board held that concurrence in the changing of hours of work is a function of the employer, and that while the employer could agree to incorporate such a provision in an agreement and could delegate the authority to persons under its jurisdiction to accede to or deny the request of the employee, the Tribunal had no power under section 70 of the PSSRA to make such a delegation.

In the *Economists Case* of 1971,[92] the Tribunal held that a proposal concerning travel time on government business, including attendance at courses, seminars, conferences and training sessions, was directly related to hours of work and therefore was arbitrable.

Proposals that letter carriers be entitled to leave the office and commence their deliveries at a fixed hour, except in emergency situations,[93] that translators should not be given assignments of any nature on Saturdays, Sundays or holidays for more than three consecutive weeks,[94] or that half the employees in the bargaining unit be assigned to work on the day shift[95] were held to infringe on section 7 of the PSSRA and were referred, subject to a caveat that any recommendation be of a discretionary, and not of a mandatory, nature.

A proposal that employees be permitted to work part time was held arbitrable in an *Economists Case* of 1980.[96] However, the Board determined that the proposal should not be included in the award, but urged the parties to address themselves to the issue and attempt to resolve it before the expiry of the arbitral award then in force. The Board noted that in a news release dated 29 October 1980, the Treasury Board had announced a part-time employment policy "to foster the use of part-time employment by revising some of the impediments which have prevented managers from creating part-time positions in the past;" it also noted that the Treasury Board had stated it was prepared to undertake discussions of the policy with the bargaining agent following the publication of the award.

A proposal that employees be permitted to complete a specified portion of their work away from the employer's premises[97] has been held referable, although, as in the *Economists Case*, above, the condition was attached that the granting of permission rested in the employer's discretion.

An employer's proposals for the inclusion in an award of a provision that any schedule of normal hours established in an award was not to be construed as guaranteeing to the employees minimum or maximum hours of work were held non-arbitrable.[98]

Leave Entitlements and Related Matters

No problem has arisen regarding the arbitrability or referability of proposals on many of the common types of leave, such as vacation leave,[99] sick leave, marriage leave, maternity leave, paternity leave, adoption leave, parental leave, bereavement leave, leave to appear as a witness in judicial or administrative proceedings, leave on relocation of spouse, leave for staff-relations matters, leave without pay for personal reasons, and the carrying over of leave entitlements. Although provisions for leave with pay for specified statutory holidays are to be found in practically all collective agreements and many awards, an issue concerning statutory holidays was raised in the *Administrative Services Case* of 1978.[100] The proposal to which the employer primarily objected sought to entitle an employee who worked in an area in which a designated paid holiday is recognized, but who lived in an area in which a different designated paid holiday is recognized, to choose the day on which he wished to take that holiday. Counsel for the employer contended that the expression 'leave entitlements' in subsection 70(1) of the PSSRA did not apply to statutory holidays since the *Public Service Terms and Conditions of Employment Regulations* made under section 7 of the Financial Administration Act treated leave and holidays as separate and distinct items; 'leave entitlements' should be limited, he suggested, to permitted absences under the "Regulations". The PSSRB, on 1 September 1978, held that a holiday is a day exempt from work (where exemption is permitted) and is comprehended within 'leave entitlements'. However, while the Board insisted that it had jurisdiction to deal with the proposal, it refused to include its substance in the award. In November of that year, the Board, differently constituted, was called on, in the *Commerce Case*,[101] to deal with a proposal concerning the option of an employee to choose either of two statutory holidays in similar circumstances. The Board held that it had no jurisdiction to deal with the proposal. It would appear that the decision of the Board in the *Commerce Case* should be confined to the specific proposal at issue in that case, that is, the right of an employee to choose unilaterally which holiday he will take, and that the Board's decision does not apply to the larger question whether statutory holiday pay is an aspect of 'leave entitlements' that falls within subsection 70(1) of the PSSRA.

Payment of accrued leave entitlements to the estate of a deceased employee has been held arbitrable.[102]

The situation with regard to career-development leave and training leave has been discussed earlier in this chapter.[103] It is now clear that proposals for an allowance in lieu of salary for an employee who had been granted educational leave without pay come within subsection 70(1) of the PSSRA and are arbitrable.[104]

Terminal leave, that is, leave with specified compensation after an employee has completed a specified period of service, has been held referable.[105]

Proposals regarding the treatment to be accorded an employee who returns from a period of leave, which suggest, for example, reinstatement in his former position or transfer to another position, or proposals that would fix the maximum period during which a position is to be held open for an employee on leave, have been held non-referable and non-arbitrable.[106]

Standards of Discipline

Although 'standards of discipline' is an arbitrable matter under subsection 70(1) of the PSSRA and is therefore bargainable, nevertheless what is comprehended within the expression must be ascertained by reference to a number of other statutory provisions as well. The PSSRA affords a statutory remedy to an employee who has presented a grievance relating to "disciplinary action resulting in discharge, suspension or a financial penalty".[107] On the other hand, in those portions of the public service subject to the Public Service Employment Act (PSEA), the Public Service Commission is vested with authority to release or demote an employee because he is incompetent in performing the duties of the position he occupies or because he is incapable of performing those duties. A remedy is provided by way of an appeal to an appeal board, under section 21 of the PSEA. A proposal to entitle an employee to resort to the adjudication provisions of the PSSRA rather than to the appeal procedure under the PSEA was held non-referable.[108] In addition subsections 70(3) and 86(3) of the PSSRA provide that release and demotion, whether it be in the portions of the public service subject to the PSEA or in any other portion of the public service, are both matters that may not be dealt with in an arbitral award or in the report of a conciliation board.

The expression 'terms and conditions of employment' as defined in section 2 of the PSSRA obviously includes the circumstances in which the employer may take disciplinary action concerning an employee, and the issue is therefore bargainable. However, the use of the words 'standards of discipline' in subsection 70(1) implies some limitation on the type of matters concerning disciplinary action that may be dealt with in an arbitral award. A proposal has been held referable that no disciplinary action be imposed on an employee without just and reasonable cause and without written notice to the employee;[109] the ground stated for this ruling was that the proposal related to standards of discipline. But a proposal that written reasons be provided for suspension was held non-arbitrable.[110] Proposals for limiting reliance in subsequent disciplinary proceedings on records of previous reports of disciplinary measures or on unfavourable reports seem to have met with conflicting responses. A proposal that any unfavourable report placed in an employee's file be made available to the employee at once and be destroyed after two years was held non-arbitrable on the ground that it involved appraisal.[111] However, proposals in several later cases that notice of disciplinary action be destroyed after two years if no other disciplinary action had been taken with respect to the employee during that period were held arbitrable on the ground that they related to standards of discipline.[112] On the other hand, a proposal that any document in an employee's file of which he is unaware not be used in any manner detrimental to his well-being was held non-arbitrable.[113] A proposal forbidding the application of harsher than usual disciplinary action against an employee engaged in trade-union activities was ruled referable, subject to the caution that the prohibition was not to fetter the authority of an adjudicator.[114]

A proposal was held referable that when any administrative inquiry into an operating irregularity, accident, or incident involving air-traffic controllers was taking place, the bargaining agent should be allowed to designate an observer with the right to be present at all sittings.[115] On the other hand, a proposal was rejected that a postal employee required to report for questioning before a postal investigator be accompanied by a representative of the bargaining agent with the right to intervene and reply or refuse to reply.[116] A proposal was also rejected that any discussion about discipline between an employer representative and an employee take place only in the presence of a representative of the bargaining agent.[117]

Any reference to discipline in a collective bargaining context cannot be completely isolated from the remedial process available where an employee alleges that the disciplinary action is improper. However, it has been held[118] that "*standards* of discipline are not concerned either with the presentation of any type of grievance at various levels or even with the final adjudication thereof when no satisfactory settlement has been reached." That is to say that proposals relating to grievance procedure are not arbitrable.

The issue of disciplinary action in case of a strike has surfaced in various forms in arbitration and conciliation-board proceedings. Frequently the bargaining agent has sought a commitment from the employer that employees would be immune from disciplinary action if they refused to cross a picket line, or that the employer would not require employees to cross a picket line. Such proposals have been held non-arbitrable and non-referable.[119] A proposal that sought to limit the entitlement of the employer to impose discipline in excess of a written reprimand if an employee should refuse to cross a picket line was held non-arbitrable.[120] On the other hand, a proposal by a bargaining agent to delete from a new agreement a provision that had appeared in a previous agreement, providing for disciplinary action for employees participating in an unlawful strike, was held arbitrable.[121] Similarly a proposal by the employer to include in the agreement a provision declaring that employees participating in an unlawful strike might be subject to discipline was held referable.[122] So also was the employer's proposal that the bargaining agent agree that there would be no strike during the term of the agreement.[123] One of the objections of the bargaining agent to this proposal was that it was superfluous since it repeated a point already covered by the legislation and, in effect, would create a new offence. The Chairman of the PSSRB held that there was nothing in the PSSRA to bar reference of the proposal, and that its adoption would impose on the bargaining agent a 'contractual' obligation to observe the provisions of the Act pertaining to strikes.

Appointment and Promotion

Appointment to positions in the federal and provincial public services, which usually includes promotion to a higher level, is generally reserved to a public service commission and is, in most cases, excluded from the scope of bargaining under public service collective bargaining legislation. This is the situation under the PSSRA. For the major portion of the public service, appointment and promotion are entrusted to the Public Service Commission under the Public Service Employment Act (PSEA).[124] However, not all employees for whom the Treasury Board represents the employer under the PSSRA are appointed under the PSEA,[125] and the same holds true for the employees of some of the separate employers.[126] Consequently these employees lack the protection afforded to persons seeking employment or promotion who fall within the jurisdiction of the Commission. Nevertheless, subsections 86(3) and 70(3) of the PSSRA provide that no report of a conciliation board and no arbitral award may deal with "standards, procedures or processes governing the appointment [or] . . . promotion" of these employees, just as is provided with respect to employees who do come under the Commission.[127]

A proposal relating to filling positions according to seniority has been held non-referable,[128] and a proposal was held non-arbitrable that an employee 'green-circled' because of classification conversion be promoted to the level of his position after a certain time.[129]

A proposal for requiring a pre-employment and annual health assessment in accordance with the Periodic Health Evaluation Standard was held referable since it dealt only with the health and physical well-being of employees and had no relation to the right of appointment vested in the Public Service Commission.[130] A proposal was held arbitrable that an employee required by the employer to perform the duties of a higher classification on an acting basis be paid acting pay as if he had been appointed to the higher classification. This ruling was made on the ground that no promotion was involved and that the reference to appointment was intended simply to determine the rate of pay for such an employee.[131]

A person appointed to a position under the authority of the PSEA or a person promoted to a higher position under that authority is considered to be on probation from the date of his appointment until the end of such period as the Commission may establish for any employee or class of employees. A probationer may be rejected for cause by the deputy head at any time during the probationary period, and unless he is appointed to another position in the public service before the end of the period of notice established for him by the Commission, he ceases to be an employee.[132] There does not appear to be any administrative procedure for redress for a probationary employee in such circumstances. An employee of long standing may thus be promoted, but rejected during the applicable probationary period, and if he is not appointed to another position, his employment is terminated. His only entitlement is to have his name entered on an eligibility list so that he may be in line for new employment at a later date. In the case of separate employers and portions of the public service that do not come under the PSEA, the length of the probationary period and the consequences of rejection on probation lie entirely in the discretion of the employer.[133] Since probation is an aspect of appointment, it is not a matter that is either arbitrable or referable.[134] However, as we shall see in Chapter 11, below, a probationary employee who is rejected during his period of probation and who believes that his rejection is actually a disciplinary action resulting in discharge may seek relief through the grievance and adjudication processes.

The prescription of selection standards is an aspect of appointment and is therefore not a matter that can be dealt with in an arbitral award or under the terms of reference of a conciliation board. For the portions of the public service that come under the jurisdiction of the Public Service Commission, that agency is empowered to prescribe selection standards, but such standards are not to be inconsistent with any classification standard prescribed under the Financial Administration Act for a particular position or class of positions.[135] Although these processes for prescribing selection standards do not apply to those portions of the public service that are not under the jurisdiction of the Commission, nevertheless, since selection standards are involved in the appointment process, the limitations on arbitrability and referability apply to those portions as well.

Appraisal

Appraisal is neither arbitrable nor referable by reason of subsections 70(3) and 86(3) of the PSSRA. Quite a number of proposals have been made by bargaining agents seeking to gain for an employee the right to examine and sign any performance review relating to his work,[136] to have the opportunity of rebutting adverse comments contained in a review,[137] and to have periodic access to his personnel file;[138] all these proposals have been held non-arbitrable.[139] On the other hand, a similar proposal was held referable, but a proposal that persons who make the performance assessment must have observed the employee for one half of the period for which his performance was evaluated was not referred.[140]

Security of Employment

> For many years . . . the acceptance of an appointment to a position in the [Public] Service, for all practical purposes, carried with it an

> exceptionally high degree of job security. Recently, however, economic lay-offs, reorganizations, relocations, technological changes, contracting out and similar occurrences and policies have brought public servants to the realization that "job loss" is indeed a distinct possibility for them. Since the rule applicable at the present time is what is popularly known as "the reverse order of merit," a stigma attaches to the laid off or redundant employee in the Public Service that invariably has a most traumatic effect upon him. Job security has therefore emerged as a key issue. . . .[141]

However, the standards, procedures and processes governing lay-off of employees because of lack of work or because of the discontinuance of a function have been dealt with in a number of public service collective bargaining statutes in the same way as appointment and promotion: that is, they have been treated as matters excluded from the scope of bargaining. This is the situation under subsections 56(2), 70(2) and (3), and 86(2) and (3) of the PSSRA. For most portions of the public service, these matters fall within the jurisdiction of the Public Service Commission,[142] but they are not arbitrable or referable even with respect to agencies that are not subject to the PSEA. In view of these provisions, proposals seeking commitments from the employer that employees in a bargaining unit be guaranteed continuous employment or that no employees in the bargaining unit be laid off during the lifetime of the agreement have been consistently rejected in arbitral awards and in terms of reference to conciliation boards.[143] Nevertheless, in 1970, the Postmaster General gave to the Council of Postal Unions a letter of understanding, attached to the collective agreement, undertaking that "a planned modernization program will not result in lay-offs of present full-time employees during the life of the present agreement provided employees will accept relocation, reassignment and retraining."[144] The same letter of understanding was attached to subsequent collective agreements between the employer and the Council, as well as to the last agreement between the employer and the Letter Carriers Union of Canada negotiated under the PSSRA. The 1975 agreement between the employer and the Canadian Union of Postal Workers stipulated that, except as otherwise provided in the agreement, the employer guarantee continuous employment to all employees covered by the agreement until the signing of the next agreement;[145] the same provision appeared in the 1981 agreement.

It has been held that the exclusionary principles discussed above do not preclude the arbitrability or referability of proposals designed to alleviate the impact of lay-off. Thus relocation costs, severance pay, and other emoluments consequent on lay-off may properly be dealt with in such proceedings.[146] However, bargaining agents' attempts to 'win' arbitration or referral for some other types of protection in the event of lay-off have generally proved unsuccessful. These have included consultation and agreement on the persons to be laid off,[147] lengthy advance notice of likelihood of lay-off,[148] transfer of laid-off employees to other available positions, retraining and educational leave for the purpose of retraining laid-off employees, and extension of the period during which a laid-off employee is entitled to enter a closed competition.[149]

The obverse of the 'lay-off' coin is recall or re-employment. There is no direct reference to reappointment in the PSSRA. However, reappointment is regarded as an aspect of appointment; the provisions of the legislation regarding the bargainability of appointment also apply to reappointment. The PSEA sets forth the principles that apply to the recall of public servants who have been laid off. It provides:

> 29. (3) Notwithstanding anything in this Act, the Commission shall, within such period and in such order as it may determine, consider a lay-off for appointment, without competition and subject to sections 30 and 37 [which deal with priorities for employees on leave of absence and ministerial staffs], in priority to all other persons, to any position in the Public Service for which in the opinion of the Commission he is qualified.
>
> (4) Notwithstanding subsection(2) [which declares that a person ceases to be an employee when he is laid off], a lay-off is entitled during such period as the Commission may determine for any case or class of cases, to enter into any competition for which he would have been eligible had he not been laid off.[150]

Closely associated with any discussion of lay-off is that of technological change, which often affects security of employment.[151] There is no express provision in the PSSRA regarding technological change.[152] Nevertheless, numerous proposals relating to technological change have been dealt with in arbitral awards and in terms of reference to conciliation boards. The employer has objected to such proposals on the ground either that they would encroach on the employer's reserved rights under section 7 of the Act, especially the right to determine the organization of the public service, or that they would conflict with the provisions of the several exclusionary sections of the

Act. No proposal concerning technological change has been held arbitrable.[153] On the other hand, a different approach has been adopted in terms of reference to conciliation boards. Thus, in the *Air Traffic Control Case* in 1971,[154] a proposal was held referable that the employer notify the bargaining agent in advance of any proposed technological change likely to have an effect on terms and conditions of employment, and that consultations take place concerning that proposed change. So also was a proposal held referable in the *Postal Operations Case* in 1970[155] that if an employee were transferred from one location to another by reason of technological change, his moving expenses would be paid by the employer. On the other hand, the following proposals, among others, have been held non-referable:

- An employee affected by technological change should have the right to choose another opening by seniority, to be retrained and, if unable to meet the requirements of a new position, to be offered a position at a lower level.[156]
- The introduction of technological changes should not commence until the parties had agreed upon any necessary amendments to the collective agreement with respect to the staffing or use of the technological change.[157]
- In the event of technological improvements or changes, mechanization, change in working methods or production methods, the employer was to preserve job security and maintain the full employment of the employees in the bargaining unit, refrain from laying off or terminating the employment of employees or reducing an employee's rate of pay or lowering his classification.[158]
- The relocation of an employee because of technological change should require the written consent of that employee.[159]
- If agreement could not be reached after negotiations according to procedures laid down respecting technological change during the life of the agreement, the bargaining agent should, during that period, have the right to strike.[160]

Despite these rulings, the fact remains, as the then Chairman of the PSSRB noted in the *Postal Operations Case* in 1972, that:

> ...the issues that are raised by this [technological change] proposal are indeed of grave concern to the employees in the bargaining unit. They reflect the fear of employees that their future welfare may be affected, seriously and detrimentally, by technological

> innovations. Whether that fear is justified or unjustified in view of commitments that have been made by the Employer[161] is immaterial at this point. The fact is that it exists and that it will undoubtedly hang like a pall over deliberations of the Conciliation Board in this dispute. If it were not discussed openly, it would insinuate itself in some fashion into the discussion on the other items. It would be unrealistic to say that the Conciliation Board is forbidden to discuss the problems of technological changes.

He therefore recommended:

> ...that you [that is, the Conciliation Board] might devote some, but not an undue, amount of time to seeking a formula, apart from the terms of the collective agreement, that would allay the fears of the employees. Needless to say, no recommendation on this score can be embodied in your report. If you should feel inclined to adopt the suggestion . . . made, you will of course have to have due regard for the fact that jurisdiction over much of what is comprehended in the proposal of the Bargaining Agent falls within the jurisdiction of the Public Service Commission, an independent statutory body, and not within that of the Employer.[162]

Since then, many proposals for dealing with technological change and related matters have been 'referred' to conciliation boards, subject to the caveat just mentioned.[163]

If the employer contracts out work normally performed by employees in a bargaining unit, it has the effect of reducing the amount of work available to employees in the unit and may even result in their lay-off. Bargaining agents have, from time to time, made proposals to limit the circumstances in which the employer could contract work out. Proposals of this nature have been held non-arbitrable.[164] On the other hand, such proposals have been included in the terms of reference to conciliation boards, again subject to the caveat mentioned earlier.[165]

In the *Nursing Case*[166] the bargaining agent proposed that no work normally performed by employees in the bargaining unit should be contracted out. Three previous agreements had contained an article in which the employer had agreed to continue a past practice of giving all reasonable consideration to continued employment of employees who would otherwise become redundant because of work contracted out. The proposal of the bargaining agent was referred subject to the caveat. So also was a proposal in the *Printing Operations Case*[167] which stipulated that work contracted out by the employer would be contracted to companies paying wages comparable to those paid by employers who were party to a collective agreement. On the other hand, in the *Defence Research Board Case*,[168] the Chairman of the PSSRB had ruled that contracting-out is an aspect of lay-off and is not referable; a similar ruling was made in the *Engineering and Land Survey Case*,[169] on a proposal that an employee displaced by contracting-out should receive his rate of pay until he was re-employed or until he was entitled to an immediate annuity.

The assignment of work that has previously been performed by employees in one bargaining unit to employees in another bargaining unit or to employees who are not included in a bargaining unit may have the same effect as the contracting-out of work to persons who are not, or do not employ, public servants. Bargaining agents have sought to avoid the possibility of such assignments by proposals of various sorts and appear to have met with a variety of responses. The question of the arbitrability of work-assignment proposals has seldom been raised. A proposal that work normally performed by members of the bargaining unit not be done by excluded staff was held non-arbitrable.[170] As far as the referability of such matters is concerned, with a few exceptions,[171] the tendency has been to refer proposals of this nature to the conciliation board, subject to the caveat referred to earlier.[172] Similar rulings have been made regarding proposals for the maintenance of minimum manning for specified operations.[173]

Although bargaining agents have sought to restrict the entitlement of the employer to contract out work normally performed by employees in a bargaining unit, they have also sought to limit the employer's right to require bargaining-unit employees to perform duties other than those specified in their respective job descriptions. Such proposals have been held non-arbitrable,[174] but they have been referred to conciliation boards subject to a caveat.[175]

Transfer

Reassignment, that is, transfer of a public servant to a new position or work station may involve an 'appointment'. Where this is so in those areas of the public service that come within the jurisdiction of the Public Service Commission, the transfer falls within the jurisdiction of the Commission, and bargaining with respect to it is barred by subsection 56(2) of the PSSRA. In addition, subsections 70(3) and 86(3) of that Act provide that no arbitral award may deal with, and no report of a conciliation board may contain, any recommendation concerning the standards, procedures or processes governing the transfer of employees.[176] It has been held that these provisions are designed to protect the right of the employer to determine the qualifications of employees transferred — that is, the standards of performance — and the procedures and processes that are ancillary to the determination of such qualifications.[177] Proposals that would require the written consent of the employee to be transferred[178] or that the employer notify employees at least twelve months prior to the proposed date of a transfer[179] or that the procedures concerning transfer during the life of the agreement must be established in consultation with the bargaining agent[180] have been held non-referable. However, the impact of transfer is referable.[181] In the *Air Traffic Control Case*[182] a proposal to repay a transferred employee the cost of a house he owned at his original location was held referable.

In the 1975 *Postal Operations Case*[183] the bargaining agent proposed that the employer reimburse an employee for any expenses resulting from relocation. This proposal was part and parcel of a proposal that relocation require the written consent of the employee. The proposal was not referred to the conciliation board on the ground that it related to transfer. The part of the proposal concerning reimbursement of expenses would clearly appear to deal with the impact of transfer and would therefore be referable, especially in the light of the ruling in the *Air Traffic Control Case*.[184] It could therefore be argued that the ruling in the *Postal Operations Case*[185] should be confined to that part of the proposal requiring written consent. Nevertheless, the 1975 Postal Operations agreement did contain a provision for reimbursement of expenses incurred by an employee as the result of relocation.

Training and Career Development

Responsibility for the training and development of employees in the portions of the public service that are subject to the Public Service Employment Act is shared by the Public Service Commission and the Treasury Board.[186] Consequently, under subsection 56(2) of the PSSRA, proposals regarding training and career development that infringe on the jurisdiction of the Commission lie outside the scope of bargaining. Thus a proposal was held non-referable that there be added to a career-development provision contained in the previous agreement a clause calling for the parties to appoint a committee of equal numbers, part of whose duty was to establish a list of required courses for employees.[187] A proposal that a trust fund of a specified amount be established to enable employees to attend conferences was held non-arbitrable,[188] and a proposal for the establishment of a trust fund for a training and retraining program that apprentices would be required to attend was ruled non-referable.[189] On the other hand, proposals that where an employee is required to take training, the employer bear the expense involved have been held referable.[190]

It has now been established that proposals regarding leave for training and career development are arbitrable. However, proposals requiring the employer to provide training or training leave for laid-off employees have not met with the same response.[191] In the 1978 *Postal Operations Case*[192] such a proposal was referred with the caution that the conciliation board should make no recommendation that would encroach on the PSEA. In the 1979 *Economists Case*,[193] in commenting on a proposal concerning lay-off, the PSSRB remarked that "there are instances where no genuine effort is being made to assist surplus personnel in retraining for available employment within the public service." The Board suggested that if a laid-off employee's entitlement to reappointment under section 29 of the PSEA were to be meaningful, he "must be given an opportunity for appropriate training experience."

Classification

Classification of positions is a matter excluded from bargaining in many jurisdictions. Under section 7 of the PSSRA, authority to classify positions in the federal public service is reserved to the employer.[194] Proposals, in one form or another, that were considered as trenching in any degree on the employer's authority to classify positions have been held non-arbitrable.[195] Various proposals regarding classification have also been held non-referable, but some have been referred subject to the caveat mentioned earlier. For example, such a course was adopted in a *Postal Operations Case* in 1975,[196] where the bargaining agent proposed that where a position was reclassified because of technological change, and the incumbent of the position was unable to follow a retraining course, he should maintain his original classification or its equivalent.[197] However, a proposal was held referable that an employee, on being assigned to a new position, be provided with a written statement of the reasons for the classification level of the position.[198] An expedient to deal with an awkward situation involving reclassification in the Post Office was adopted because of a complaint by the Council of Postal Unions that the employer had violated the prohibition in section 51 of the PSSRA against altering working conditions during the period when collective bargaining for a new agreement was in progress. The PSSRB held that the employer was entitled, notwithstanding section 51, to introduce coding machines into the Post Office during this period, to assign duties to employees operating the machines, and to classify the positions occupied by such employees at the P.O.1 level. The Council had contended that the coders should have been classifed at the P.O.4 level, that is, the same level as that at which letter sorters were classified. A strike later occurred over this issue during the lifetime of the collective agreement. Mr. Eric Taylor was appointed by the Chairman of the PSSRB to mediate the dispute. The mediator recommended that the coders be reclassified at a higher level than that proposed by the employer, and that a special settlement committee be established to resolve the coder dispute. The committee recommended that a special 'category' be instituted for coders and set their wage rate. The recommendations were accepted by the parties.[199]

The Preparatory Committee on Collective Bargaining in the Public Service contemplated,[200] as does the PSSRA, that there would be a close relationship between classification and pay. One of the side effects of this relationship, the PSSRB has said,[201] is that:

> Where a plan of compensation is so closely tied in with a plan of classification as is the case in the Public Service . . ., factors already taken into account in the construction of the classification standard are not normally compensated for additionally by a differential in wage rates between employees in the same class or level.

There is another area, as well, where classification may have a significant impact on employer-employee relations in the public service. As we noted earlier,[202] classification is the basic criterion for determining bargaining units under the PSSRA. Since authority to classify employees rests entirely in the hands of the employer, it may enable the employer to alter the composition of bargaining units unilaterally.[203] There is a degree of consultation on classification standards between the classification division of the Treasury Board and the bargaining agents, but such consultation is an act of grace and fails to take into account the legitimate interests of the bargaining agents.[204] Several reports have recognized the grave problems that would arise if classification standards were made bargainable as part of the normal process of bargaining; they have recommended that such standards be dealt with by special agreements, that they have their own duration, and that bargaining impasses in respect to them be resolved by binding arbitration.[205]

Superannuation, Death Benefits, and Compensation for Work-Related Injuries

The Public Service Superannuation Act[206] provides for payment, in specified circumstances, of an annuity or other benefit for a person who dies or ceases to be employed in the public service. The annuity or benefit is based on the number of years of pensionable service during which an employee is required to contribute to the Superannuation Account. The Act stipulates the amounts that the employees and the employer are to contribute to the Superannuation Account and sets out the circumstances in which a person who is not entitled to an annuity or other benefits may recover his contributions. The Act also provides in certain situations for the payment of benefits to persons who cease to be employed by reason of disabilities that render them incapable of pursuing regularly any substantially gainful employment.[207] In addition it provides for the payment of a benefit not in excess of $500 on the death of a participant.[208]

Subsection 56(2) of the PSSRA provides that no collective agreement made under the Act may contain any provision that may conflict with anything that has been or may be established on the basis of the Public Service Superannuation Act; the same limitation applies to an arbitral award and to the report of a conciliation board under subsections 70(2) and 86(2) of the PSSRA.

The following proposals relating to superannuation have been held non-referable because they impinge on the provisions of the Public Service Superannuation Act:

- A proposal that when an employee terminates his employment for any reason other than retirement, the employer should pay him all the moneys contributed by him to the superannuation fund established under the Act, as well as an amount equal to the contributions made on his behalf by the employer[209]

- A proposal that the employer reimburse each employee in the bargaining unit by an amount equal to his contribution to the fund[210]
- A proposal that upon termination of employment other than by retirement, an employee shall be entitled to the payment of interest based on the amount of his contribution[211]
- Proposals that the employer contribute to pension plans in addition to those presently in operation in order to allow for early retirement of employees in the bargaining unit[212]
- A proposal that an employee laid off because of contracting-out should be entitled to receive his rate of pay until he becomes entitled to an immediate annuity.[213]

A proposal for granting leave of absence with compensation at a stated level for a long-service employee until such time as he qualified for a pension under the Superannuation Act was held referable as an aspect of severance pay.[214] A proposal was held non-arbitrable that an employee have the option of waiving his entitlement to severance pay and, in lieu of such pay, be granted an equivalent period of retirement leave with pay in order to satisfy the requirement of a five-year contributing period that would make him eligible for a disability pension.[215] A proposal was also held non-arbitrable that the award keep in effect certain provisions regarding superannuation and benefit plans for employees on leave; these provisions had been included in a previous collective agreement, but the employer now objected to them.[216]

Section 3 of the Public Service Superannuation Act empowers the Governor in Council to establish an advisory committee to advise and assist the Minister (that is, the President of the Treasury Board) in matters arising in connection with the administration of the Act. The operations of this committee and the opinions of the bargaining agents concerning its functioning are discussed in Chapter 5, below.

Bargaining agents seek to have superannuation made a bargainable item. Provision for the superannuation of public servants is generally made by legislation that determines the rights, not only of public servants who are subject to collective bargaining and who may be bound by a collective agreement, but of many others as well. This legislation determines the entitlement of employees who do not happen to be included in a bargaining unit for which a bargaining agent has been certified; of persons who are excluded from the collective bargaining provisions of the legislation; of persons who are not deemed to be employees under the legislation; and of employees of Crown corporations and other bodies. Such classes of employees include those persons employed as university teachers by the federal government, and administrative-trainees, organization and methods staff and personnel administrators; persons employed in a managerial or confidential capacity,[217] employees of the Senate and the House of Commons and the Library of Parliament,[218] such bodies as Canadian Arsenals Limited, St. Lawrence Seaway Authority, Atomic Energy of Canada Limited, a number of separate employers, including Atomic Energy Control Board, Economic Council of Canada, National Research Council of Canada and Northern Canada Power Commission, and the employees of the Yukon Territory. The result of permitting the establishment through collective bargaining of a different pension plan for each bargaining unit would be the same as for appointment, promotion and lay-off.[219] In addition, fragmentation in bargaining pensions might well jeopardize the actuarial soundness of the Superannuation Account and of pension entitlements that employees and others have already acquired; certainly it would seriously inhibit employee mobility.[220]

The Government Employees Compensation Act provides for the granting of compensation to an employee or, in the case of the death of the employee, to his dependents, where he is caused personal injury by accident arising out of and in the course of his employment, or where the employee is disabled by reason of an industrial disease caused by the nature of his employment. The conditions under which compensation is to be paid and the rate of compensation are the same as those provided for employees who suffer injuries or are disabled in such circumstances and who are employed by persons other than Her Majesty under the law of the province where the employee is usually employed.[221] Subsection 8(5) of the Act declares that no employee is to have any claim against Her Majesty except for compensation under this Act.

The principles discussed above concerning the bargainability, arbitrability and referability of proposals that infringe on the Public Service Superannuation Act also apply to proposals that conflict with the Government Employees Compensation Act. The following proposals in this area have been held non-arbitrable and non-referable:

- A proposal that a fire-fighter should be granted injury-on-duty leave with pay for the period of time during which he was unable to perform his duties because of heart, lung or hearing disability[222]

- A proposal that the employer should pay to an employee partially or totally disabled as a result of accident or illness caused or aggravated because of unsatisfactory work environment an amount of compensation which, with other available benefits, would represent full and total redress with respect to the prejudices suffered[223]
- Proposals that the employer implement and pay premiums in connection with a group-travel insurance plan providing employees with coverage for loss resulting from injury or death while travelling on behalf of the employer.[224]

However, a proposal that participation in the Public Service Disability Insurance Plan be made optional for members of the bargaining unit concerned was held referable.[225]

In concluding the discussion of this topic, note may be taken of two recent cases peripherally connected with it. In 1978 it was held that a proposal that the employer institute a voluntary dental plan and pay half the cost was not arbitrable.[226] However, the following year, a proposal for the institution of a compulsory dental plan was held arbitrable on the ground that the cost of such a proposal to the employer and its value to the employees were matters that would be considered in arriving at a settlement on rates of pay and to that extent would directly affect such rates.[227]

Grievances

Section 90 of the PSSRA entitles an employee who considers himself aggrieved on almost any matter affecting his terms and conditions of employment to present a grievance, except where an administrative procedure for redress is provided in or under an Act of Parliament. Where the grievance relates to the interpretation or application to the employee of a provision of a collective agreement or arbitral award, he may present a grievance only if he has the approval of, and is represented by, his bargaining agent. However, under section 91, only grievances that relate to the interpretation or application to the employee of a collective agreement or arbitral award or disciplinary action resulting in discharge, suspension or a financial penalty may be carried to third-party binding adjudication (arbitration). Section 98 of the Act entitles the employer or the bargaining agent to refer to adjudication a dispute regarding an obligation arising out of a collective agreement or arbitral award if the enforcement of the obligation is not one that may be the subject of a grievance by an employee.[228]

The grievance procedure, as such, is not arbitrable.[229] It has been held that proposals that seek to enlarge the types of grievance beyond those listed in section 90 of the PSSRA or that may be carried to adjudication under sections 91 and 98 of that Act are not referable to a conciliation board. Indeed the view has been expressed that if the employer were to enter into an agreement that departed from these provisions, neither the PSSRB nor an adjudicator could uphold the agreement.[230] Proposals have been held non-referable[231] that would entitle an employee to present a grievance on any form of disciplinary action, including reprimand, as well as matters for which an administrative procedure for redress is provided by or under an Act of Parliament; some of these matters lie within the jurisdiction of the Public Service Commission under the Public Service Employment Act.[232] A proposal was held non-arbitrable that the employer consult on a classification system, including provisions for implementation and, in case of disagreement, reference to third-party binding adjudication.[233] A proposal that the employer agree to 'contractual arbitration' for matters not covered by the agreement was held non-referable.[234]

In a number of cases, proposals to give the bargaining agent a greater role in the processing of grievances than is provided for under sections 90, 91 and 98 of the PSSRA have been held non-referable. The proposals were as follows:

- A proposal that an employee should not be entitled to present *any* grievance without the consent of the bargaining agent[235]
- A proposal that a grievance, once presented by an employee at the first level, could not be withdrawn without the consent of the bargaining agent[236]
- Proposals that a bargaining agent should be entitled to present grievances in its own name without regard to the limitations in section 98 of the PSSRA.[237]

A proposal that a union steward be present during all discussions between any representative of the employer and an employee concerning terms and conditions of employment was referred with the proviso that any pertinent recommendation of the conciliation board that called for the presence of the steward be optional with the employee.[238]

Proposals concerning the onus of proof and the type of admissible evidence in disciplinary adjudication have been challenged by the employer on several occasions:

- A proposal that in such matters the onus to prove the charge or allegation rest on the employer was held referable.[239]
- A proposal that any evidence obtained by a security guard in the Post Office would not be admissible in an adjudication hearing was held non-referable.[240]
- To the extent that it applied to the employer, a proposal was held referable that no evidence secured through electronic surveillance systems may be used by the employer or accepted by an adjudicator; however, the portion relating to the authority of the adjudicator was held non-referable.[241]
- A proposal was held referable[242] but non-arbitrable[243] that prohibited the employer from introducing at a disciplinary-adjudication hearing unfavourable documents or notations on an employee's personal file that it had agreed to destroy after a specified period.
- A proposal that union stewards and other employees were not to be called on to testify against an employee in any disciplinary hearing or any 'investigation' was referred on consent of the employer when the proposal was reworded to establish privilege for discussions between the parties in an attempt to settle a grievance.[244]

Accommodation, Working Environment and Related Matters

The following proposals that may be said to come under this head have been held non-arbitrable:

- A proposal that called for minimum standards of space and cleanliness for working accommodation[245]
- A proposal to provide a specified range of temperatures at the work place of employees and protective clothing, where necessary, when an employee's duties are being performed on premises "other than his own"[246]
- A proposal that the employer make all reasonable provision for the occupational safety and health of employees[247]
- A proposal that the employer equip vehicles with two-way radio-telephone links where employees are required to travel certain specified distances.[248]

The rulings on whether accommodation and environmental proposals are referable have been somewhat more favourable to the position of bargaining agents. A proposal that employees be provided with sufficient parking space at their place of employment, without expense to them, was held referable.[249] In addition the following were referred, but subject to the caveat mentioned earlier:

- A proposal that the employer provide, as far as feasible within the limitations of the building and space, proper accommodation for all employees in the Post Office, within which to have their meals and individual lockers for their clothing and other personal effects[250]
- A proposal that an employee have the right to refuse to start work or to refuse to continue to work when the conditions of the environment are such that his life, health or safety may be affected.[251]

The treatment of proposals on the use of electronic surveillance and similar devices in the Post Office has had a rather curious history. In 1975 a proposal that the employer should not use such devices was referred, with some misgivings, by the Chairman of the PSSRB.[252] An objection by the employer to the referability of a similar proposal in 1978, as well as a proposal that the employer should not construct overhead installations that could be used to observe or spy on employees was subsequently withdrawn by the employer, and the proposals were referred.[253] Then, in 1981, the employer registered its objection to a proposal for the dismantling and removal of closed-circuit television cameras. The objection was not withdrawn, but was not sustained.[254]

Bilingualism

Various aspects of Canada's bilingual policy have called for attention in terms of reference to conciliation boards. Proposals that would require the use at work of one or other of the official languages have not been referred.[255] Similarly referral has not been made of proposals that knowledge of either of the official languages not be deemed a requirement for employment, promotion or transfer.[256] On the other hand, the impact on employees of the introduction or extension of bilingual services, other than in relation to employment, has been regarded as referable or arbitrable. Examples are:

- A proposal for language training on the employer's time and at the employer's expense[257]
- Proposals for the payment of a bilingual differential or bonus.[258]

Professional Papers and Publications

A matter that has concerned professional employees is the acknowledgement of their authorship of professional material for publication. However, proposals have been held non-arbitrable that would entitle an employee to publish material on professional subjects related to his work and to receive acknowledgement of his authorship of articles and memoranda on subjects within the scope of his employment.[259] There have been no instances where a ruling has been requested on the referability of such proposals.

Discrimination

The employer has objected to a number of proposals by bargaining agents that would require the employer to undertake that there be no discrimination against employees by reason, among other characteristics and circumstances, of sex, marital status, race, creed, colour, national origin, age, place of residence, political or religious affiliation, or by reason of union activity.[260] There does not appear to have been any case in which an anti-discrimination proposal was referred to arbitration, presumably because such a proposal could scarcely be brought within the ambit of subsection 70(1) of the PSSRA. The response to the referability of such proposals has depended on the area of operations in which a veto on discrimination is sought. As we noted earlier, the PSEA vests in the Public Service Commission authority to appoint and promote employees and to establish selection standards.[261] It may, under subsections 12(1) and (2) "prescribe selection standards as to education, knowledge, experience, language, age, residence or any other matters that, in the opinion of the Commission, are necessary or desirable having regard to the nature of the duties performed," but the standards are not to "discriminate against any person by reason of sex, race, national origin, colour or religion." To the extent to which anti-discrimination proposals infringe on the authority of the Commission, they are, of course, outside the scope of bargaining under the PSSRA. However, some anti-discrimination proposals are couched in general terms that forbid discrimination on various grounds without tying the discrimination to any particular area of operation. Some of the areas that would be comprehended in such a proposal would fall within the authority of the Commission as indicated above; some would not. The inclination of the Chairman of the PSSRB, in dealing with such a general proposal, has been to draw attention to the provisions of the PSEA, to declare that such provisions are 'inviolate', and to refer the proposal with the cautionary statement that if the conciliation board did see fit to make a recommendation with respect to it, the conciliation board would have to devise a formula that preserved the authority of the Commission.[262] Section 32 of the PSEA specifies the circumstances in which an employee in the public service may engage in political activity.[263] Anti-discrimination proposals regarding political activity have been referred to the extent that they do not conflict with these provisions.[264] Anti-discrimination proposals concerning union activity have been referred on the ground that they do not conflict with the 'unfair practices' provisions of the PSSRA that 'protect' union activity[265] and would have the effect, if accepted, of imposing on the employer a 'contractual' obligation to observe those provisions.[266]

The Canadian Human Rights Act of 1977 contains a comprehensive code regarding discrimination affecting, among other matters, recruitment, promotion, training, transfer, or any other matter relating to employment that deprives an individual of any employment opportunities on the ground of race, national or ethnic origin, colour, religion, age, sex, marital status, or physical handicap. The Act provides that there must be no wage differential between males and females who are performing work of equal value in the same establishment.[267] The Act is declared to be applicable to Her Majesty in right of Canada. Subsection 6 (1) of the Public Sector Compensation Restraint Act preserves the right of employees to resort to the remedies under the Canadian Human Rights Act in spite of the restraints on compensation plans imposed by the Public Sector Compensation Restraint Act.

Union Security

Proposals that employees in the bargaining unit must become and remain members of the bargaining agent as a condition of employment have been held non-referable to a conciliation board.[268] Proposals that once an employee becomes a member of the bargaining agent, he should maintain his membership in good standing as a condition of continued employment, were held referable in part;[269] however, the requirement that maintenance of membership be a condition of employment was not held referable because it was said that that part of the proposal violated the 'unfair practices' provisions of the PSSRA.[270] Proposals regarding check-off of union dues have been held non-arbitrable[271] and non-referable.[272]

A proposal has been held non-arbitrable that the employer co-operate in providing facilities for communication between the bargaining agent and employees in the bargaining unit who are stationed outside Canada.[273] However, a more recent proposal that the employer agree to provide office space for all levels of a bargaining agent was held referable on the ground that the provision of such space would facilitate the work of the bargaining agent representing the employees since dealing with the employer is a matter related to terms and conditions of employment.[274]

Notes

1. *Final Report of the Assembly Advisory Council on Public Employee Relations*, California State Assembly, 15 March 1973 (Sacramento, Calif.: California State Assembly, 1973), p. 101.
2. Arvid Anderson, "Public Employee Bargaining", 1 *Urban Lawyer* (1969), p. 317.
3. D.D. Carter, "Legal Regulation of Collective Bargaining in the Ontario Public Sector", 29 *Relations Industrielles/Industrial Relations* (1974), pp. 776–77.
4. See also J. Finkelman, "Public Sector Bargaining: Some Basic Considerations", 3 *Queen's Law Journal* (1976), p. 23:

> I have heard it said repeatedly by some that public servants should be treated as citizens rather than subjects, that, especially in the higher technical occupations and in the professional occupations, public servants have a contribution to make in the development of policy. I am not in sympathy with those who insist that such contribution should be made through the collective bargaining process.
>
> ...What the proponents of the view I have rejected are seeking to achieve is to attain through collective bargaining something that is conveyed by the rather vague concept identified by the slogan 'participatory democracy'. To my mind, participatory democracy, whatever form it may ultimately take, ought not to be smuggled into our system of government under the guise of an aspect of collective bargaining.

Charles M. Rhemus made the comment that "one ought never to confuse the wishes of a limited interest group like a union with those of the entire electorate." *Proceedings of the International Symposium on Public Employment Labor Relations*, New York, 3–5 May 1971 (New York: New York State Public Employment Relations Board, 1971), p. 51.

5. Compare, however, the fact that the Newfoundland Public Service (Collective Bargaining) Act, subsec. 41(2), states:

> Where an employer is unable to implement the provisions of a collective agreement or judgment of an adjudication board by reason of being prohibited by law from so doing, the employer shall use its best endeavours to introduce or cause to have introduced and supported as a Government measure legislation designed to implement and give effect to such provisions.

In other words, the government negotiator, the representative of the employer in bargaining under the Act, may make concessions to a bargaining agent that go beyond those permitted under existing legislation, and the government is then committed to introduce in the Legislative Assembly legislation necessary to validate the agreement. Since the government negotiator is either the President of the Treasury Board, who would no doubt have consulted his colleagues and obtained their approval, or a person to whom he has delegated his authority and who must act under the control and supervision of the President of the Treasury Board, it is safe to assume that if the government negotiator agrees to terms and conditions of employment that have to be validated by legislation, the Cabinet — the Executive Council — will have given its approval before the government negotiator agreed to them.

6. More than half of the collective agreements contain similar provisions. The latest collective agreement between the employer and the Canadian Union of Postal Workers, probably in anticipation that the employees in the bargaining unit concerned would shortly come under the Post Office Corporation Act, declares, "Notwithstanding the restrictions provided by this agreement, the parties agree that they may exercise all additional rights resulting from amendments of the Public Service Staff Relations Act, or other Acts to which they are subject, from the coming into force of such amendments."

For the impact of the Anti-Inflation Act on arbitration under the PSSRA, see Chapter 10, p. 443, below.

7. For a discussion of the types of matters that have been included in collective agreements negotiated under the PSSRA, see Chapter 7, below.

A rather extensive review of the decisions of the courts concerning what is comprehended within the expression 'terms and conditions of employment' is contained in the decision of the Divisional Court of Ontario in *Re Liquor Control Board of Ontario et al. and Ontario Liquor Board Employees' Union et al.* (1980) 29 O.R. (2d) 705 at 708–710, which said that the term 'working conditions' has a very broad compass in the ordinary meaning, that 'terms and conditions of employment' is even wider in scope than 'working conditions', and that even the more restricted term 'working conditions' must be interpreted as encompassing "all matters that are involved between the employer and the employees. In negotiating a collective agreement, many items are considered as being terms and conditions of employment that do not necessarily relate specifically to the day-to-day working conditions." The Court held that insurance benefits for retirees were 'terms and conditions of employment' for those currently employed, and that the union could negotiate for those terms and conditions. However, the significance of this decision for the scope of bargaining in the federal public service would have to be considered in light of the restrictive provisions of the PSSRA.

8. R.S.C. 1970, c. G-8.

9. The Government Vessels Discipline Act, R.S.C. 1970, c. G-12, s. 9, contains a list of offences for which an employee employed on a government vessel may be disciplined and sets out the nature of the penalty applicable for each offence. The list includes desertion, neglect to join a vessel, quitting a vessel without leave, wilful disobedience, causing wilful damage, embezzlement, assaulting an officer, and combining with others to disobey a lawful command. The Act also sets out the procedure whereby the penalties may be imposed.

   Employer-Employee Relations in the Public Service of Canada: Proposals for Legislative Change (Ottawa: Information Canada, 1974), Part I, p. 94 (hereafter referred to as the *Finkelman Report*), recommended that if the authorities decided against amending or repealing the Government Vessels Discipline Act, consideration might be given to deleting reference to it in Schedule III of the PSSRA; in this event it would still have the protection accorded to any other Act of Parliament under paragraph 56(2)(*a*) of the PSSRA.

10. For discussion of the impact of the provisions of this Act on the scope of bargaining under the PSSRA, see below, p. 174 ff.

11. For a discussion of the impact of the provisions of this Act on the scope of bargaining under the PSSRA, see below, pp. 185–87.

   Although anything that has been done or may be done under the four statutes listed in Schedule III of the PSSRA is excluded from the scope of bargaining under the Act, nevertheless, in both the Public Service Employment Act and the Public Service Superannuation Act, provision is made for a measure of consultation with representatives of employees. See Chapter 5, p. 228 ff., below.

12. (1971) Conciliation Board file 190 – 2 – 11.

13. See below, p. 156.

14. A large number of collective agreements contain a 'state security' clause expressed in the same terms.

15. Paul Prasow *et al.*, *Scope of Bargaining in the Public Sector — Concepts and Problems* (Washington, D.C.: U.S. Department of Labor, 1972), p. 6.

16. See, in this connection, Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration* (Agincourt, Ontario: Canada Law Book, 1977), pp. 11 – 12 and 168 ff.

17. See below, p. 174 ff.

18. As was set out in Chapter 3, p. 73 ff., above, the Financial Administration Act, subsec. 7(1), vests in the Treasury Board a wide range of managerial powers and functions. However, by subsec. 7(6) of the Act, these powers and functions "do not extend to any such matter that is expressed, determined, fixed, provided for, regulated or established by any Act otherwise than by the conferring of powers or functions in relation thereto on any authority or person specified in such Act. . . ."

    The New Brunswick Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25 contains a management-rights clause identical in terms with that in the federal Act. However, it also includes another management-rights provision which states that subject to a qualification, "nothing in this Act affects the right of the employer to engage private contractors or contract work out for any purpose whatsoever" (subsec. 6[2]). The above qualification forbids an employer, during the course of a lawful strike, to "replace the striking employees or fill their position with any other employee" (paragraph 102[3][*a*]).

    As in New Brunswick, and with the same qualification regarding employees engaged in a lawful strike (subsec. 3[2]), the Yukon Public Service Staff Relations Ordinance, C.O.Y.T. 1978, c. P-11 declares (subsec. 3[2]) that "nothing in this Ordinance affects the right of the employer to engage private contractors or contract work out for any purpose whatsoever."

19. See further, Chapter 11, p. 553 ff., below.

20. For a discussion concerning the arbitrability and referability of proposals pertaining to grievance procedures, see below, pp. 188 – 90.

21. See below, Chapter 12, pp. 621 – 22.

22. See discussion on 'union security', p. 194, below.

23. See below, Chapter 9.

24. For further discussion of s. 50, see Chapter 6, p. 279 ff. and Chapter 12, p. 649, below.
25. (1970) PSSR Reports K 505. The employer had traditionally and historically exercised a considerable amount of decision-making authority relating to the plan, and the policy of insurance governing the plan was subject to termination on ninety days' written notice. Counsel for the employer contended that access to the plan was a privilege and not a term or condition of employment. The PSSRB held that if the plan had been obligatory for all employees, there could be no question that it would be considered a term or condition of employment, and it could see no distinction between an obligatory plan and one that the employer had undertaken to make available to those employees who wished to participate in it (K 517).
26. (1979) 1 F.C. 92 at 95. See also Ryan J. in *Her Majesty the Queen and Public Service Alliance of Canada* (1980) 1 F.C. 801 at 805.
27. For a discussion of options, see below, Chapter 10, p. 425 ff.
28. See below, p. 162 ff.
29. Although the list is not to be taken as exhaustive, some of the matters that have been dealt with in arbitral awards, without any objection by either party, include pay rates, supervisory differential, overtime compensation, shift and week-end premiums, call-back pay, stand-by pay, recall pay, transportation allowance, meal allowance, pay for designated holidays, regular hours of work, various types of leave: vacation leave, sick leave, marriage leave, maternity leave, parental leave, paternity leave, bereavement leave, leave for adoption of a child, leave for relocation of a spouse, leave for staff-relations matters, leave without pay for personal needs. In early arbitral awards, the Tribunal was inclined to give a rather narrow construction to the generic matters enumerated in subsec. 70(1) but, as was pointed out in the *Forestry Case* (1979) Arbitral Awards file 185-2-120, by 1974, the Tribunal had begun to apply a broader approach.
30. *Economics Case* (1977) Arbitral Awards file 185-2-154; *Commerce Case* (1977) Arbitral Awards file 185-2-158; and *Actuarial Science Case* (1977) Arbitral Awards file 185-2-160.
31. The *Commerce Case*, note 30, above.
32. *Professional Institute of the Public Service of Canada and the Public Service Staff Relations Board* (1979) 1 F.C. 92 at 95. See also *The Queen and Public Service Alliance of Canada* (1980) 1 F.C. 801, per Ryan J., at 805.
33. (1979) Arbitral Awards file 185-2-198.
34. *The Queen and the Public Service Alliance of Canada* (1980) 1 F.C. 801 at 804.

35. (1980) Arbitral Awards file 185–2–221.

36. (1981) 2 F.C. 265.

37. (1971) Arbitral Awards file 185–2–28.

38. For example, *Computer Systems Case* (1977) Arbitral Awards file 185–2–150.

39. For example, *Dentistry Case* (1978) Arbitral Awards file 185–2–171 and *Historical Research Case* (1977) Arbitral Awards file 185–2–145. In the latter case, however, the PSSRB expressed its regret that a privilege of attendance at conferences, relating to a career-development program, previously conceded by the employer, was being taken away.

40. (1978) Arbitral Awards file 185–2–184.

41. *Professional Institute of the Public Service of Canada and Public Service Staff Relations Board* (1979) A548–78 (unreported). The Board, in its *Twelfth Annual Report*, 1978–79, p. 88, commented, "The Court appeared to take the view . . . that the subject matter . . . i.e., career development, was not merely 'directly related to' one of the matters referred to in subsection 70(1), but was a condition of employment that actually fell within 'leave entitlements'."

42. (1969) Arbitral Awards file 185–2–5. The agreement presently in effect relating to the communications unit contains an extensive list of items for joint consultation, but the list does not include any of the items dealt with in the *Communications Case* just mentioned. However, the agreement does contain a number of clauses on outside employment, contracting-out, and statements of duties. Extensive lists of items for joint consultation are now common in virtually all agreements between the employer and the Public Service Alliance of Canada. See below, Chapter 7, p. 313 ff.

43. (1978) Arbitral Awards file 185–2–185.

44. *Professional Institute of the Public Service of Canada and the Public Service Staff Relations Board* (1979) A-587–78 (unreported).

45. (1971) Arbitral Awards file 185–2–47.

46. (1972) Conciliation Board file 190–5–15.

47. (1968) Conciliation Board file 190–2–7.

48. See below, Chapter 10, p. 471.

49. See, for example, the situation in the *Nursing Case* discussed in note 163, below.

50. See above, p. 160.

51. See above, p. 158 ff.

52. *Economists Case* (1970) Arbitral Awards file 185–2–13.

53. (1980) Arbitral Awards file 185–2–223.

54. (1979) Arbitral Awards file 185–2–195.

55. (1980) Arbitral Awards file 185–2–221.

56. (1980) Conciliation Board file 190–2–85. The position of the PSSRB has been upheld by the Federal Court of Appeal: see *Her Majesty the Queen and Public Service Alliance of Canada* (1980) 1 F.C. 801 at 804; and *The Queen and Public Service Alliance of Canada* (1981) A–459–80 (unreported).

57. *Commerce Case* (1980) Arbitral Awards file 185–2–218. In the *Translation Case* (1980) Conciliation Board file 190–2–85, the Chairman referred a proposal that if an employee classified at a certain level translates material that is not revised by a competent reviser, he should receive, for all work done in that manner, a pay supplement equal to the increase he would have been entitled to receive if he had been promoted to the next higher level.

58. *Economists Case* (1981) Arbitral Awards file 185–2–259.

59. *Education Case* (1978) Conciliation Board file 190–2–66.

60. *Biological Sciences Case* (1972) Arbitral Awards file 185–2–48. The decision of the Arbitration Tribunal was affirmed by the Board: see (1973) PSSRB file 168–2–25. In the *Biological Sciences Case* (1981) Arbitral Awards file 185–2–239, the Board denied on similar grounds a proposal that biologists who perform work equal to that of medical officers should receive the same remuneration as medical officers. The Board's decision was upheld by the Federal Court of Appeal: *Professional Institute of the Public Service of Canada* v. *Public Service Staff Relations Board* (1982) 1 F.C. 584.

    Note also clause 15.07 of the collective agreement (Research Officers and Research Council Officers) of the National Research Council and the Professional Institute of the Public Service, which expired in June 1980:

    > In recognition of exceptional merit the Council may pay employees at a rate or rates in excess of the maximum set forth in Schedule 1 for Principal Research Officers and Research Council Officers 5.

    This group, incidentally, operates under the conciliation-board option.

61. See subsec. 70(3) and, below, p. 176.

62. *Commerce Case* (1972) Arbitral Awards file 185–2–46; *Economists Case* (1973) Arbitral Awards file 185–2–56.

63. In the *National Research Council Case* (1976) Conciliation Board file 190–9–47, the wage schedule provided for a range of rates for each grade of research-council officer, with a bar inserted between any two rates in the range. Advancement across the bar was a matter that rested in the sole discretion of the employer.

Since such advancement would involve appraisal of the employee concerned, proposals regarding such advancement were held not referable.

Performance-pay provisions have been included for two bargaining units that were operating under the arbitration option: the foreign affairs unit and the scientific research unit. The provision was withdrawn from the latest agreement for the latter unit. There is a performance-pay plan for one unit on the conciliation-board option: the defence scientific service unit. See Chapter 7, pp. 335–36, below.

64. For some implications of this restriction on existing contract provisions, see Chapter 7, p. 336, below.

65. See, for example, *Communications Case* (1969) Arbitral Awards file 185–2–5.

66. *Firefighters Case* (1970) Arbitral Awards 185–2–11.

67. See above, pp. 159–60.

68. *Ibid*.

69. *Air Traffic Control Case* (1971) Conciliation Board file 190–2–11.

70. *Ibid*.

71. *Northern Canada Power Commission Case* (1975) Conciliation Board file 190–10–33. In this case the Chairman of the PSSRB, in the terms of reference to the conciliation board, commented that it may be true in one sense that a proposal for freezing rental charges and providing free utilities relates to the function of the employer as landlord; the fact nevertheless remains that rental charges and the cost of utilities are factors that have a direct bearing on rates of pay.

72. *National Research Council Case* (1979) Arbitral Awards file 185–9–193. An interesting clause in the commerce collective agreement which expired in December 1981 provides that:

> Rates of pay that are effective prior to the signing of this agreement shall apply to persons who have ceased to be employed in this bargaining unit during the retroactive period because of:
>
> (a) retirement, provided that the employee is entitled to an accrued annuity or has reached the age of 55 and is entitled to an immediate annual allowance pursuant to the Public Service Superannuation Act,
> (b) death
> (c) layoff
> (d) acceptance of employment outside the bargaining unit in another portion of the public service where the Treasury Board is the employer.

73. *General Services Case* (1981) Conciliation Board file 190–2–104.

74. See, for example, *Lightkeepers Case* (1970) Arbitral Awards file 185–2–9; *Economists Case* (1970) Arbitral Awards file 185–2–13.

75. See, for example, *Agriculture Case* (1980) Arbitral Awards file 185–2–155; *Economists Case* (1980) Arbitral Awards file 185–2–233. However, in the latter case, a proposal that employees should be paid in advance for their vacation leave was held arbitrable.

76. See below, Chapter 9, p. 410 ff.

77. *Pharmacy Case* (1971) Arbitral Awards file 185–2–19; *Architecture and Town Planning Cases* (1971) Arbitral Awards file 185–2–21; and (1973) Arbitral Awards file 185–2–59.

78. *Actuarial Science Case* (1977) Arbitral Awards file 185–2–160.

The following provision is commonly found in agreements for professional employees:

> The employer shall reimburse the employee for his payment of membership or registration fees to an organization or governing body when the payment of such fees is a requirement for the performance of the duties of his position.

See below, Chapter 7, p. 340.

79. *Architecture and Town Planning Case* (1978) Arbitral Awards file 185–2–184; and *Dentistry Case* (1978) Arbitral Awards file 185–2–171.

80. *Biological Sciences Case* (1981) Arbitral Awards file 185–2–239.

However, clauses providing for paid attendance at conferences are common in agreements relating to employees in professional units.

81. *Air Traffic Control Case* (1969) Conciliation Board file 190–2–6.

82. *Nursing Case* (1978) Conciliation Board file 190–2–61.

83. R.S.C. 1970, c. C-38. The Act provides, in respect of a tort committed by a servant of the Crown, that the Crown, with certain procedural limitations, is liable for damages as if it were a private person.

84. *Revenue Postal Operations Case* (1973) Conciliation Board file 190–2–24.

85. For example, *Clerical and Regulatory Case* (1971) Arbitral Awards file 185–2–33 (reduction in weekly and daily hours of work); *Revenue Postal Operations Case*, note 84 above (work to be performed on five consecutive days whenever possible); *Commerce Case* (1978) Arbitral Awards file 185–2–185 (flexible hours); *Translation Case* (1980) Conciliation Board file 190–2–85 (formula for converting work of translators computed in work units into equivalence in days of work). See also, above, p. 161, concerning arbitrability of proposal that parties engage in consultation on hours of work.

86. See note 85, above.

87. (1981) Arbitral Awards file 185–2–244.

88. (1980) Arbitral Awards file 185–2–221.

89. (1981) Arbitral Awards file 185–2–257.

90. (1981) Arbitral Awards file 185–2–259.

91. (1974) PSSRB file 168–2–51.

92. (1971) Arbitral Awards file 185–2–13.

93. *Letter Carriers Case* (1981) Conciliation Board file 190–2–94.

94. *Translation Case* (1980) Conciliation Board file 190–2–85.

95. *Postal Operations Case* (1980) Conciliation Board file 190–2–86.

96. *Economists Case* (1980) Arbitral Awards file 185–2–233.

97. *Education Case* (1978) Conciliation Board file 190–2–66.

98. *General Labour and Trades Case* (1971) Arbitral Awards file 185–2–15; *Purchasing and Supply Case* (1971) Arbitral Awards file 185–2–47. Such a clause is now fairly common in collective agreements.

99. In the *Economists Case* (1980) Arbitral Awards file 185–2–233, a proposal was held arbitrable that where the employer cancels or alters a period of vacation leave previously approved in writing, the employer should reimburse the employee for the non-refundable portion of vacation contracts and reservations made by the employee.

100. (1978) Arbitral Awards file 185–2–175.

101. *Commerce Case* (1978) Arbitral Awards file 185–2–185.

102. *Lightkeepers Case* (1970) Arbitral Awards file 185–2–9. The Tribunal said that such leave entitlement is something earned by an employee while he is working and is to be taken advantage of only when he ceases to live or to be employed. See also *Public Service Alliance of Canada (in the Estate of T.R. Gordon) and the Treasury Board* (1970) PSSR Reports M 1549, discussed in Chapter 11, note 6, below.

103. See pp. 160–61, above.

104. *Auditing Case* (1981) Arbitral Awards file 185–2–246.

105. *Postal Operations Case* (1970) Conciliation Board file 190–2–7. However, as we shall see (p. 186), a similar proposal that also called for a retired employee to be paid the difference between the specified compensation and his retirement pension was held not referable, *Postal Operations Case* (1978) Conciliation Board file 190–2–63. For a discussion concerning leave in case of lay-off or redundancy of positions, see below, p. 178. For a discussion concerning injury-on-duty leave, see below pp. 187–88.

106. *Postal Operations Case* (1972) Conciliation Board file 190–2–19; *Communications Case* (1977) Arbitral Awards file 185–2–158. The decision in the latter case was upheld by the Federal Court of Appeal in *Professional Institute of the Public Service of Canada and the Public Service Staff Relations Board* (1978) 1 F.C. 92.

107. Paragraph 91(1)(*b*). See further Chapter 11, below.

108. *Postal Operations Case* (1980) Conciliation Board file 190–2–86.

For a discussion of the problems that have arisen in drawing the line between disciplinary action and incompetence or incapacity, and recommendations for amendments in the legislation relating to the scope of bargaining on such matters, see Chapter 11, below.

109. *Postal Operations Case* (1978) Conciliation Board file 190–2–63.

110. *Lightkeepers Case* (1970) Arbitral Awards file 185–2–9.

111. *Purchasing and Supply Case* (1978) Arbitral Awards file 185–2–167. Regarding 'appraisal', see below, p. 176.

112. *Economists Case* (1978) Arbitral Awards file 185–2–186; *Purchasing and Supply Case* (1980) Arbitral Awards file 185–2–220. In the *Economists Case*, above, a proposal that an employee have an opportunity to sign an adverse report was rejected on the ground that the report did not necessarily deal only with standards of discipline. However, the agreement for the economics, sociology and statistics unit, which expired in June 1979, did have such a provision. A provision of this sort is now commonly included in collective agreements. See below, Chapter 7, pp. 317–18.

113. *Economists Case*, note 112, above.

114. *Postal Operations Case* (1978) Conciliation Board file 190–2–63.

115. *Air Traffic Control Case* (1971) Conciliation Board file 190–2–11. The conclusion reached was that such a proposal would not require the amendment of the Aeronautics Act, R.S.C. 1970, c. A-3.

116. *Postal Operations Case*, note 114, above. The basis for the rejection of this proposal was that it would contravene the Post Office Act, R.S.C. 1970, c. P-14. *Query*: Was the main defect in the proposal the lack of entitlement of the employee to remain silent?

117. *Ibid*. The reason assigned was that such a practice would interfere with the rights of employees who might choose not to be represented by the bargaining agent in connection with disciplinary action. See, in this connection, Chapter 11, p. 565, below. It was indicated in the decision that if the representation were permissive, but not mandatory, the proposal would be referable.

118. *Lightkeepers Case* (1970) Arbitral Awards file 185–2–9 NS.

119. *Economists Case* (1970) Arbitral Awards file 185–2–13; *Mathematics Case* (1970) Arbitral Awards file 185–2–14; *Drafting and*

Illustration Case (1978) Arbitral Awards file 185–2–162; *Economists Case* (1978) Arbitral Awards file 185–2–186; *Postal Operations Case* (1968) Conciliation Board file 190–2–1; *Data Processing Case* (1980) Conciliation Board file 190–2–88. In the *Drafting and Illustration Case* and in the *Data Processing Case*, the proposals that were denied also called for a commitment by the employer that employees would not be required to perform the work of striking employees. In the *Postal Operations Case* it was noted that the refusal by a number of employees acting in concert to cross a picket line would constitute a strike according to paragraph 101(2)(*a*) of the PSSRA. See also Chapter 12, pp. 642–43, below.

120. *Economists Case* (1981) Arbitral Awards file 185–2–259.

121. *Economists Case* (1979) Arbitral Awards file 185–2–213.

122. *Postal Operations Case* (1972) Conciliation Board file 190–2–19.

123. *Ibid*. Most of the public service collective bargaining statutes contain provisions prohibiting the employees' engaging in an unlawful strike, and some also forbid the employer's declaring an unlawful lock-out.

124. S. 8 of the Public Service Employment Act provides that "Except as provided in this Act, the Commission has the exclusive right and authority to make appointments to or from within the Public Service of persons for whose appointment there is no authority in or under any other Act of Parliament." The Act further provides, in paragraph 34 (1) (*b*), that the Governor in Council may make regulations "notwithstanding any other Act, applying all or any of the provisions of this Act that do not otherwise apply, including the provisions relating to appointments, to any portion or part of any portion of the Public Service." Where a regulation is made on the basis of such provision, any authority for appointment in such other Act is superseded during the time the regulation is in force (subsec. 34[2]). Appointments by the Commission are to be made on the basis of merit, and the Commission is to prescribe selection standards (s. 10); concerning this provision see below, p. 176.

125. For example, The National Capital Commission.

126. For example, National Film Board.

127. See, for example, *Defence Research Board Case* (1972) Conciliation Board file 190–2–15, where a proposal was held non-referable that the procedure concerning appointments and promotion relating to employees of the Defence Research Board (at the time a separate employer not subject to the PSEA) be established during the life of the agreement in consultation with the bargaining agent.

The *Finkelman Report*, Part I, p. 63, recommended that bargaining agents should not be given the right to bargain on initial appointment or promotion since there did not appear to be any way this could be done "and yet protect the public interest in the maintenance of the essential features of the merit principle itself."

The Special Joint Parliamentary Committee on the *Finkelman Report* recommended in the *Report to Parliament of the Special Joint Committee of the Senate and the House of Commons on Employer-Employee Relations in the Public Service*, First Session, Thirtieth Parliament, 1974–75–76 (hereafter referred to as *Report of the Special Joint Committee*, 1976), p. 47:9, that a special task force be established to review the PSEA and the role of the Public Service Commission on personnel management and employer-employee relations in the public service. A task force was, in fact, established (the D'Avignon Committee), and it recommended, in the *Report of the Special Committee on the Review of Personnel Management and the Merit Principle*, p. 127 ff. (hereafter referred to as the *D'Avignon Report*) that a new forum of collective bargaining, the National Staffing Council, be established to bargain staffing and related matters.

128. *Postal Operations Case* (1975) Conciliation Board file 190–2–43. However, it was held in this case that a proposal for preferential assignment of an employee to a job in a cluster of positions in the Post Office was referable where the assignment had not been treated as an appointment made on the basis of the PSEA. (The successful candidate continued at the same classification level.) See also *MacGregor* (1973) Adjudication file 166–2–672. A similar ruling was made in the *Postal Operations Case* (1978) Conciliation Board file 190–2–63, with respect to proposals that would have obliged the employer to fill vacant positions in such a cluster by a process of bidding according to seniority in a certain order of preference, but subject to a caveat.

129. *National Research Council Case* (1978) Arbitral Awards file 185–9–164.

130. *Nursing Case* (1978) Conciliation Board file 190–2–61.

131. *Commerce Case* (1980) Arbitral Awards file 185–2–218.

132. Public Service Employment Act, s. 28.

133. See below, Chapter 11, pp. 588–91.

134. In the *Northern Canada Power Commission Case* (1978) Conciliation Board file 190–2–77, a proposal was held non-referable that defined the term 'probation' and provided that a new employee be considered to be on probation for the first ninety calendar days of his employment and for thirty days following promotion, and that an employee rejected on probation during a second or subsequent probationary period be reinstated in his former position or be appointed to an equivalent position. This case

concerned a separate employer that is not governed by the PSEA. The decision is equally applicable to portions of the public service that do come under that Act.

The *Finkelman Report* (Part I, pp. 84–85) recommended that during his probationary period, a promoted employee should have a right of appeal to the Commission, which should be vested with remedial powers. If the Commission were to uphold the deputy head, the rejected employee should have the right to notice of rejection equal to that provided a laid-off employee and should retain a right of recall as does a laid-off employee.

The *D'Avignon Report* recommended (p. 136) that the mandate of the National Staffing Council include deliberation on "the determination of the duration of probationary periods for appointments".

135. Public Service Employment Act, subsec. 12(1). The Commission is required to consult with representatives of bargaining agents and the employer concerning such selection standards, at their request or on its own initiative. See below, pp. 183–85, concerning classification standards.

The *Finkelman Report* (Part I, pp. 63–64) noted that the bargaining agents considered that current arrangements for such consultation were too haphazard to meet their needs and recommended that the procedures under the PSEA be strengthened to provide agents with the assurance that they would be consulted and would have an adequate opportunity to make their views known before regulations, selection standards or similar instruments are made generally known. The *D'Avignon Report* (p. 135) recommended that the mandate of the National Staffing Council include selection standards.

136. Such a provision is commonly found in collective agreements in the public service.

137. See the agreement between the employer and the Professional Association of Foreign Service Officers (PAFSO), quoted in Chapter 7, p. 319, below.

This clause was made necessary by the provision in the agreement for performance pay. See note 63, above.

138. Such a provision is commonly found in agreements in the public service.

139. See *Economists Case* (1970) Arbitral Awards file 185–2–13; *Mathematics Case* (1970) Arbitral Awards file 185–2–14; *Agriculture Case* (1976) Arbitral Awards file 185–2–122; *Purchasing and Supply Case* (1978) Arbitral Awards file 185–2–167; *Economists Case* (1978) Arbitral Awards file 185–2–186; and *Purchasing and Supply Case* (1980) Arbitral Awards file 185–2–220.

140. *Data Processing Case* (1980) Conciliation Board file 190–2–88. Nevertheless, such a provision was inserted in the data-processing

agreement (including the 1981 agreement). A similar clause appears in a number of collective agreements.

141. The *Finkelman Report*, Part I, p. 69. The 1977 *Annual Report of the Public Service Commission* indicates that in 1976 the number of employees laid off in those areas of the public service that came under the PSEA was 1012; in 1977 the number rose to 2347. The 1980 *Annual Report* notes that 1539 employees were laid off in the period it covered.

142. The Public Service Employment Act, s. 29, provides:

> (1) Where the services of an employee are no longer required because of lack of work or because of the discontinuance of a function, the deputy head, in accordance with regulations of the Commission, may lay off the employee.
>
> (2) An employee ceases to be an employee when he is laid off pursuant to subsection (1).

143. See, for example, *Economists Case* (1970) Arbitral Awards file 185–2–13; *General Labour and Trades Cases* (1970) Arbitral Awards files 185–2–15 and 185–2–16; *Economists Case* (1979) Arbitral Awards file 185–2–213; *Postal Operations Case* (1968) Conciliation Board file 190–2–1; *Postal Operations Case* (1975) Conciliation Board file 190–2–43; *Postal Operations Case* (1978) Conciliation Board file 190–2–63; *Letter Carriers Case* (1980) Conciliation Board file 190–2–87.

144. Since the letter of understanding was given by the Postmaster General, it is a nice point whether it had legal effect, that is, whether it was binding on the employer.

145. Clause 129.11. In the later 1960s a number of military bases were closed, and this affected the welfare of a large number of employees. An arrangement called the 'Manpower Adjustment Procedures' was made to alleviate hardship that might result. These procedures were introduced to cover a special situation, but they have been applied to cope with other redundancies that have occurred since then. For a summary of these procedures, see *Employer-Employee Relations in the Public Service of Canada: Proposals for Legislative Change: Supplementary Observations and Recommendations* (Ottawa: Information Canada, 1975), pp. B9-B11. (Hereafter referred to as *Supplementary Observations*.)

146. See *Finkelman Report*, Part I, p. 75.

147. See, for example, *Defence Research Board Case* (1972) Conciliation Board file 190–5–15; *Economists Case* (1970) Arbitral Awards file 185–2–13.

148. See, for example, *Education Case* (1975) Conciliation Board file 190–2–225.

149. See, for example, *Communications Case* (1969) Arbitral Awards file 185–2–5; *Economists Cases* (1970) Arbitral Awards file

185–2–213; (1978) Arbitral Awards file 185–2–186; (1979) Arbitral Awards file 185–2–213. See, however, an arrangement concerning lay-off, developed under the consultation process in the Department of National Defence, discussed in Chapter 5, p. 238, below.

150. The Ontario Crown Employees Collective Bargaining Act, R.S.O. 1980 c. 108 s. 7, states that "reappointments of employees" are bargainable, and the Ontario Public Service Employment Act extending collective bargaining to members of the Ontario Police Force (subsec. 27[3]), treats "methods of effecting . . . reappointments" in the same fashion. Recall or, more specifically, reappointment, may also be bargained for under the Prince Edward Island Civil Service Regulations (EC 521/77).

151. Technological change may affect other aspects of working conditions as well: for example, transfer, reclassification, reduction in wages, demotion. The discussion in the text at this point is confined primarily to technological changes that affect continued employment.

152. The only statute governing public service collective bargaining that deals expressly with technological change is the British Columbia Public Service Labour Relations Act.

153. For example, *Drafting and Illustration Case* (1978) Arbitral Awards file 185–2–162, where a proposal calling for one year's advance notice of changes that would result in changes to employment status or working conditions was held non-arbitrable.

154. (1971) Conciliation Board file 190–2–11. In this instance the parties were bargaining the terms of a new agreement to replace one that had expired. The expired agreement had contained a clause that obliged the employer to give the bargaining agent ninety days' notice before the introduction of any *major* technological changes; on the receipt of such notice, either party could request consultation concerning the proposed changes. The proposal of the bargaining agent, to which the employer objected, would have required notice to be given to the bargaining agent of *all* technological changes. The Chairman of the PSSRB held that since the proposal went no further than to require consultation and did not oblige the employer to defer the introduction of technological change, it was referable.

155. (1970) Conciliation Board file 190–2–7.

156. *Ibid*.

157. *Air Traffic Control Case* (1971) Conciliation Board file 190–2–11.

158. *Postal Operations Cases* (1972) Conciliation Board files 190–2–19 and 190–2–20. See, however, the provisions relating to this matter in the latest agreement, discussed in Chapter 7, pp. 325–26, between the employer and the Canadian Union of Postal Workers.

159. *Postal Operations Case* (1975) Conciliation Board file 190–2–43; *Postal Operations Case* (1978) Conciliation Board file 190–2–63; *Postal Operations Case* (1980) Conciliation Board file 190–2–86.

160. *Postal Operations Case* (1975) Conciliation Board file 190–2–43.

161. See above, p. 177 and note 144.

162. See comments pp. 162–63, above. Following a reference of the nature discussed in the text in the 1975 *Postal Operations Case*, the Canadian Union of Postal Workers and the employer entered into a comprehensive provision (article 29) respecting technological change. See note 158, above.

163. In the negotiations for the renewal of the 1974 collective agreement for the nursing unit, the bargaining agent proposed the inclusion in the agreement of an article identical in wording to Article 29 of the collective agreement between the employer and the Canadian Union of Postal Workers referred to in note 162, above. At the hearing before the Chairman of the PSSRB on the terms of reference to the conciliation board, counsel for the employer objected that most parts of the proposal could not be referred, primarily on the ground that they infringed on the employer's authority under s. 7 of the PSSRA and on the authority of the Public Service Commission under the PSEA. The Chairman, after an exhaustive review of earlier cases, referred the proposal of the bargaining agent, with the caveat expressed in earlier cases: *Nursing Case* (1978) Conciliation Board file 190–2–61. In the course of his decision, the Chairman said:

> I am of the opinion that the interest of the parties and board would be best served by my dealing with the objections of counsel for the Employer globally in the context of the totality of the Bargaining Agent's proposal. Were I to deal individually with each objection and refer only certain clauses or parts thereof of the Bargaining Agent's proposal, I fear that the conciliation board might well be confronted with a proposal for their consideration so disjointed in nature as to confuse rather than clarify any issues relating to technological and work procedure changes. Such a result would be most undesirable as it would only add to the board's already onerous task.

164. See, for example, *Purchasing and Supply Case* (1971) Arbitral Awards file 185–2–47; *Economists Case* (1977) Arbitral Awards file 185–2–154; *Commerce Case* (1977) Arbitral Awards file 185–2–158; *Economists Case* (1978) Arbitral Awards file 185–2–186. In the *Communications Case* (1969) Arbitral Awards file 185–2–5, the Tribunal held that a proposal for consultation regarding contracting-out was non-arbitrable.

165. See, for example, *Postal Operations Cases* (1975) Conciliation Board file 190–2–43; (1978) Conciliation Board file 190–2–63;

(1981) Conciliation Board file 190–2–95; *Letter Carriers Case* (1981) Conciliation Board file 190–2–94; *Data Processing Case* (1980) Conciliation Board file 190–2–88.

Contracting-out provisions now appear in approximately two thirds of the collective agreements in the public service; many of these relate to bargaining units whose bargaining agents have specified arbitration as the applicable dispute-resolution process. However, virtually all contracting-out provisions are of a very general nature; for example:

> The employer will continue past practice in giving all reasonable consideration to continued employment in the Public Service of employees who would otherwise become redundant because work is contracted out.

166. (1978) Conciliation Board file 190–2–61.

167. (1971) Conciliation Board file 190–2–10.

168. (1972) Conciliation Board File 190–5–15.

169. (1978) Conciliation Board File 190–2–73.

170. *Administrative Services Case* (1977) Arbitral Awards file 185–2–150.

171. For example, the *Postal Operations Case* (1978) Conciliation Board file 190–2–63. It was proposed that all tasks and functions required for the repair and maintenance of equipment be performed by employees in the bargaining unit.

172. For example, *Postal Operations Cases* (1970) Conciliation Board file 190–2–7; (1972) Conciliation Board file 190–2–19; (1975) Conciliation Board file 190–2–43; (1978) Conciliation Board file 190–2–63; *Printing Operations Case* (1971) Conciliation Board file 190–2–10; *Air Traffic Control Cases* (1971) Conciliation Board file 190–2–11; and (1976) Conciliation Board file 190–2–48; *Revenue Postal Operations Case* (1973) Conciliation Board file 190–2–24.

173. For example, *Air Traffic Control Cases* (1971) Conciliation Board file 190–2–11; (1976) Conciliation Board file 190–2–48; (1977) Conciliation Board file 190–2–56.

174. *Lightkeepers Case* (1970) Arbitral Awards file 185–2–9; *Firefighters Case* (1970) Arbitral Awards file 185–2–11.

175. For example, *Postal Operations Cases* (1970) Conciliation Board file 190–2–7; (1972) Conciliation Board file 190–2–19; (1975) Conciliation Board file 190–2–43; (1980) Conciliation Board file 190–2–86. In several arbitration proceedings, the bargaining agent only went as far as to propose that the employer provide an employee with a statement of his duties, but such proposals were held non-arbitrable: *Communications Case* (1969) Arbitral Awards file 185–2–5; *National Research Council Case* (1973) Arbitral

Awards file 185–9–64; *Purchasing and Supply Case* (1978) Arbitral Awards file 185–2–167. On the other hand, such proposals were referred subject to the caveat discussed earlier: *Postal Operations Cases* (1970) Conciliation Board file 190–2–7; (1972) Conciliation Board file 190–2–19.

The *Finkelman Report*, Part I, pp. 69–81, examined at length the problems that would arise if lay-off and recall were made bargainable on a unit-by-unit basis and recommended that these matters be left within the jurisdiction of the Public Service Commission subject to certain safeguards for the employees. In his *Supplementary Observations*, the author of the *Report* modified his views and recommended (p. D2) that the criteria governing long-term lay-off should be bargainable, but that the recall of employees should remain with the Commission. In addition he recommended that as far as separate employers and their employees were concerned, all matters arising out of lay-off and recall should be made fully bargainable (p. D5).

The Special Joint Committee, in its *Report*, 1976, pp. 47:21–47:24, recommended that technological change be recognized as a prerogative of the employer, but that the impact of such a change and the extent of advance notice required be subject to bargaining. The dispute-resolution process relating to technological change would be confined to arbitration; resort to strike or lock-out to resolve such a dispute would be forbidden.

The D'Avignon Committee recommended that the mandate of the National Staffing Council should include (*D'Avignon Report*, pp. 251–52) deliberations on:

(vii) the rules governing order of lay off and recall

(viii) the duration of the notice of surplus status and the notice of lay off status

(ix) the rights of employees on surplus or lay off status including:
- access of such employees to re-training
- the maximum period of time that the name of a laid-off employee can remain on a priority lay off list; the minimum such period to be stipulated in the legislation as being one year
- the circumstances in which an employee would forfeit his or her place on a priority lay off list.

Bill C-28, which received first reading on 8 March 1978, but was not proceeded with, would have amended s. 7 of the Act by empowering the employer to suspend an employee for a maximum period of sixty days for lack of work or because of a strike.

176. Transfer is a bargainable item in the public service collective bargaining legislation of a number of other Canadian jurisdictions.

177. *Air Traffic Control Case* (1971) Conciliation Board file 190–2–11.

178. *Postal Operations Case* (1975) Conciliation Board file 190–2–43; *Postal Operations Case* (1978) Conciliation Board file 190–2–63. However, the 1975 Postal Operations agreement did provide that in the event of technological change, relocation of an employee would require his or her written consent.

179. *Education Case* (1973) Conciliation Board file 190–2–25.

180. *Defence Research Board Case* (1972) Conciliation Board file 190–2–15.

181. *Education Case*, (1973) Conciliation Board file 190–2–25.

The *D'Avignon Report* (pp. 135–36) recommended that among the matters within the mandate of the National Staffing Council should be "the determination of those types of appointments which constitute transfers as well as those types of transfers which should be exempt from the competition and/or appeal processes".

182. (1971) Conciliation Board file 190–2–11.

183. (1975) Conciliation Board file 190–2–43.

184. See note 182, above.

185. See note 183, above.

186. Under the Public Service Employment Act, paragraph 5(*b*), the Commission is to "operate and assist deputy heads in the operation of staff training and development programs in the Public Service". The Financial Administration Act, paragraph 7 (1)(*b*), gives the Treasury Board authority to "determine requirements for the training and development of personnel in the public service and fix the terms on which such training and development may be carried out".

187. *Nursing Case* (1978) Conciliation Board file 190–2–61.

188. *Biological Sciences Case* (1981) Arbitral Awards file 185–2–239. The PSSRB's decision was upheld by the Federal Court of Appeal. See note 60, above.

189. *Printing Operations Case* (1971) Conciliation Board file 190–2–10.

190. *Electronics Case* (1969) Conciliation Board file 190–2–5; *Air Traffic Control Case* (1969) Conciliation Board file 190–2–6.

191. See, for example, *Computer Systems Case* (1971) Arbitral Awards file 185–2–28; *Dentistry Case* (1978) Arbitral Awards file 185–2–171.

192. (1978) Conciliation Board file 190–2–63.

193. (1979) Arbitral Awards file 185–2–213.

The *D'Avignon Report* (p. 218) commented that "Retraining assumes importance where fluctuation in . . . workload results in redundancy." Noting that management had some responsibility for retraining redundant employees, the *Report* (pp. 135–57) recommended that access of surplus or laid-off employees to retraining, access to *development training* for future promotions, and access to safety training and technological update training be included as matters within the mandate of the National Staffing Council. See also pp. 189 and 221–23 of the *Report*.

194. Paragraph 7 (1)(*c*) of the Financial Administration Act confers on the Treasury Board authority to "provide for the classification of positions and employees in the public service", except where the relevant powers and functions are conferred in any enactment on a separate employer. Several of the statutes that establish agencies identified as separate employers under the PSSRA contain express provisions relating to classification of positions in those agencies. See Auditor General Act, s. 18, and National Film Act, subsec. 13(1). Several other statutes of this class are less explicit. See, for example, Atomic Energy Control Act, s. 8; Economic Council of Canada Act, subsec. 15(1); and National Research Council Act, s. 13.

Bill C-28, which received first reading on 8 March 1978, would have amended s. 7 of the PSSRA by expanding management's reserved powers to include authority 'to assign duties to employees and positions', and "to classify positions." Bill C-22, which received first reading on 21 November 1978, also sought to amend section 7 of the PSSRA by conferring authority on the employer to establish the duties of positions and to classify positions. Neither Bill was enacted.

195. For example, *Biological Sciences Case* (1972) Arbitral Awards file 185–2–48; *Commerce Case* (1977) Arbitral Awards file 185–2–158; *Engineering and Land Survey Case* (1979) Arbitral Awards file 185–2–188; *Communications Security Establishment Case* (1979) Arbitral Awards file 185–2–194; *Biological Sciences Case* (1981) Arbitral Awards file 185–2–239.

196. (1975) Conciliation Board file 190–2–43. See also *Postal Operations Case* (1970) Conciliation Board file 190–2–7; *Postal Operations Case* (1972) Conciliation Board file 190–2–19.

197. The same sort of ruling was made in similar circumstances in the *Air Traffic Control Case* (1976) Conciliation Board file 190–2–48.

198. *Nursing Case* (1978) Conciliation Board file 190–2–61.

199. See *Postal Operations Case No. 7* (1972) PSSR Reports K 978, and *Postal Operations Case* (1974) PSSRB file 191–2–37.

200. *Report of the Preparatory Committee on Collective Bargaining in the Public Service* (Ottawa: Queen's Printer, 1965), pp. 7–13.

201. See note 60, above.

202. See above, Chapter 3, p. 101 ff.

203. See also in this connection Chapter 3, pp. 15–16, above.

204. For an account of the practice of consultation on classification standards in earlier times, see D.J. Love, *Civil Service Review* (September 1965), p. 57; J.P.Maguire and R. Geroux, *Civil Service Review* (Centennial Issue, March 1967), p. 34.

205. See *Finkelman Report*, Part I, pp. 104–106; *Supplementary Observations*, section C; and Parliamentary Committee on the *Finkelman Report*, *Report of the Special Joint Committee*, 1976, p. 47:21. Note, however, that while classification is treated in the Ontario Crown Employees Collective Bargaining Act as an exclusive function of the employer, the procedures applicable to classification and job evaluation systems are bargainable. In addition, this statute gives to an employee claiming that his position has been improperly classified a right to present a grievance and to carry it to third-party binding determination.

For a discussion of classification grievances, see Chapter 11, note 20, below.

206. Subsec. 3(1).

207. S. 12.

208. S. 43.

209. *Postal Operations Case* (1970) Conciliation Board file 190–2–7.

210. *Postal Operations Case* (1972) Conciliation Board file 190–2–19.

211. *Postal Operations Case* (1970) Conciliation Board file 190–2–7.

212. *Postal Operations Case* (1975) Conciliation Board file 190–2–43; *Air Traffic Control Case* (1976) Conciliation Board file 190–2–48.

In 1976, through joint consultation between the employer and the national executive of the bargaining agent, an early retirement program for air-traffic controllers was developed. The government approved implementation of the program, subject to the approval of Parliament. Under the Superannuation Amendment Act of 1981 (S.C. 1981, c 64), the new benefits under the legislation are to be made available retroactively to controllers who left their positions after April 1976.

213. *Engineering and Scientific Support Case* (1978) Conciliation Board file 190–2–73.

214. *Postal Operations Case* (1970) Conciliation Board file 190–2–7. A similar ruling was made in a proposal with respect to laid-off employees: *Air Traffic Control Case* (1971) Conciliation Board file 190–2–11. However, a proposal for a severance allowance in circumstances similar to those in the 1970 *Postal Operations Case* was held non-referable in the *Postal Operations Case* (1978) Conciliation Board file 190–2–63.

215. *Lightkeepers Case* (1970) Arbitral Awards file 185–2–9.

216. *Economists Case* (1981) Arbitral Awards file 185–2–259. The employer pointed out in the course of argument that although it

objected to the inclusion of such provisions in the award, the regulations under the Public Service Superannuation Act had been amended to deal with the situation.

Although superannuation may not be a matter included in the scope of bargaining under a number of the statutes dealt with in other Canadian jurisdictions, provision is made in the Ontario Crown Employees Collective Bargaining Act, subsec. 17(1), for review of the matter by the employer with the bargaining agents. In addition several of the statutes dealing with superannuation provide for participation by the bargaining agent in the administration of the legislation.

217. See Chapter 2, p. 31 ff., above.

218. See Chapter 2, p. 30, above.

219. See p. 174 ff., above.

220. The problems are explored in the *Finkelman Report*, Part I, pp. 45–103. The *Report* recommended that pension contributions, benefits and characteristics should not be made bargainable, but that Part II of the Act, which provides for supplementary death benefits, be removed from Schedule III of the PSSRA, so that only the provisions of that part of the Superannuation Act would be 'protected', and the protection would not extend to anything that *has been or may be* established on the basis of that part of the Act. The adoption of this recommendation would make certain aspects of supplementary death benefits subject to bargaining.

221. S.3. By ss. 4 and 5, special provision is made with respect to employees in the Yukon Territory and employees, other than those locally engaged, who are usually employed outside Canada.

222. *Firefighters Case* (1973) Arbitral Awards file 185–2–147. The *Finkelman Report*, Part I, p. 95, noted that "Doubts have arisen as to whether it is permissible for the parties to include in a collective agreement a provision for the payment of 'compensation benefits' over and above those determined according to the Government Employees Compensation Act. Under private sector legislation, it is permissible for trade unions to negotiate such additional 'compensation benefits'." The *Report* observed that at that time, that is in 1974, the majority of collective agreements in the public service did contain provisions for injury-on-duty leave and recommended that "doubts as to the legality of such provisions be removed so as to ensure that such additional compensation benefits constitute a bargainable issue."

223. *Postal Operations Case* (1978) Conciliation Board file 190–2–63.

224. *Commerce Cases* (1977) Arbitral Awards file 185–2–158 and (1978) Arbitral Awards file 185–2–185.

225. *Air Traffic Control Case* (1977) Conciliation Board file 190–2–56.

226. *Drafting and Illustration Case* (1978) Arbitral Awards file 185–2–162.
227. *Mathematics Case* (1979) Arbitral Awards file 185–2–211.
228. For a detailed discussion of the grievance process, see Chapter 11. See also pp. 155 and 172 ff., above.
229. *Lightkeepers Case* (1970) Arbitral Awards file 185–2–9; *Economists Case* (1970) Arbitral Awards file 185–2–13.
230. *Postal Operations Case* (1968) Conciliation Board file 190–2–1.
231. *Postal Operations Cases* (1975) Conciliation Board file 190–2–43; (1978) Conciliation Board file 190–2–63; (1980) Conciliation Board file 190–2–86.
232. For example, release for incompetence or incapacity, involuntary resignation, abandonment of position, probation. See above, pp. 172 and 174–76.
233. *Commerce Case* (1977) Arbitral Awards file 185–2–158.
234. *Postal Operations Case* (1978) Conciliation Board file 190–2–63.
235. *Postal Operations Case* (1975) Conciliation Board file 190–2–43.
236. *Postal Operations Case* (1972) Conciliation Board file 190–2–19.
237. *Postal Operations Cases* (1978) Conciliation Board file 190–2–63; (1980) Conciliation Board file 190–2–86.
238. *Postal Operations Case* (1978) Conciliation Board file 190–2–43.
239. *Postal Operations Case* (1970) Conciliation Board file 190–2–7.
240. *Postal Operations Case* (1978) Conciliation Board file 190–2–63.
241. *Ibid*.
242. *Ibid*., but with the limitation that it was not to affect the authority of an adjudicator.
243. *Economists Cases* (1970) Arbitral Awards file 185–2–13; (1978) Arbitral Awards file 185–2–186. See also discussion under standards of discipline, p. 172 ff., above.
244. *Postal Operations Case* (1975) Conciliation Board file 190–2–43.
245. *Economists Case* (1970) Arbitral Awards file 185–2–13.
246. *Drafting and Illustration Case* (1977) Arbitral Awards file 185–2–162.
247. *Commerce Case* (1978) Arbitral Awards file 185–2–185.
248. *Purchasing and Supply Case* (1971) Arbitral Awards file 185–2–47.
249. *Air Traffic Control Case* (1971) Conciliation Board file 190–2–11.
250. *Postal Operations Case* (1975) Conciliation Board file 190–2–43.
251. *Postal Operations Case* (1978) Conciliation Board file 190–2–63.
252. *Postal Operations Case* (1975) Conciliation Board file 190–2–43.
253. *Postal Operations Case* (1978) Conciliation Board file 190–2–63.

254. *Postal Operations Case* (1981) Conciliation Board file 190–2–95. The collective agreement that became effective in 1981 provided as follows:

> *Surveillance*
>
> The watch and observation systems cannot be used except for the purpose of protecting the mail and the property of the State against criminal acts such as theft, depredation and damage to property. At no time may such systems be used as a means to evaluate the performance of employees and to gather evidence in support of disciplinary measures unless such disciplinary measures result from the commission of a criminal act.

The Report of the Commission of Inquiry Relating to the Security and Investigation Services Branch within the Post Office Department (Ottawa: Minister of Supply and Services Canada, 1981) (the Marin Commission) pp. 194–95, noted that the use of observation galleries in a clandestine way was more or less accepted by the employees, but the use of the electronic eye was heartily rejected. The Commission came to the conclusion that the arguments in favour of the use of closed-circuit television were persuasive. However, it was of the opinion that comprehensive studies should be undertaken to determine which system was more cost effective. In any event, the Commission recommended that observation galleries and electronic systems should be accessible only to postal inspectors to investigate crimes, and that annual reports on the use of both these systems and the reports on investigations employing them be communicated to the leaders of the postal unions.

255. In the *Air Traffic Control Case* (1975) Conciliation Board file 190–2–48, proposals were made that the use of the French language in the air-ground communications required by air-traffic control be limited to the provision of bilingual service to visual flight-rule flights operating within the borders of Quebec, excluding certain airports, and that French be the working language in Quebec and English the working language in all other regions. A proposal regarding the working language in Quebec and other regions was also rejected in the *Postal Operations Case* (1975) Conciliation Board file 190–2–43. In 1976 a Commission of Inquiry into Bilingual Air Traffic Services in Canada was appointed. In an interim report in 1977 and in a final report in 1979, the Commission made recommendations for the introduction of bilingual air-traffic services in Quebec.

256. *Postal Operations Case* (1975) Conciliation Board file 190–2–43; *Air Traffic Control Cases* (1971) Conciliation Board file 190–2–11 and (1975) Conciliation Board file 190–2–48. In the last two cases the proposal included a provision that if an employee entered a competition for a position that required knowledge of a

second language, the applicant would be deemed to have demonstrated ability in that language, be given language training and, if unsuccessful in gaining proficiency in the second language, be transferred to a similar position elsewhere.

257. *Air Traffic Control Case* (1969) Conciliation Board file 190–2–6; *Electronics Case* (1969) Conciliation Board file 190–2–5.

258. See above, pp. 164–66.

259. *Economists Case* (1970) Arbitral Awards file 185–2–13; *Mathematics Case* (1970) Arbitral Awards file 185–2–14; *Commerce Case* (1977) Arbitral Awards file 185–2–158.

The collective agreements between the employer and two professional units (the medical unit whose agreement expired in October 1981 and the historical research unit whose agreement expired in December 1982) contain provisions regarding professional papers and authorship rights. The bargaining agent for each of these units specified arbitration as the applicable dispute-resolution process.

260. In the *Postal Operations Case* (1981) Arbitral Awards file 190–2–95, the proposal involved discrimination against left-handed employees. The employer suggested that the proposal could only be referred subject to a caveat, and it was so referred.

261. See above, p. 174 ff.

262. See, for example, *Postal Operations Case* (1975) Conciliation Board file 190–2–43; *Education Case* (1973) Conciliation Board file 190–2–25; *Library Science Case* (1978) Conciliation Board file 190–2–79.

263. See also Chapter 3, pp. 79–81, above, and Chapter 11, p. 581 ff., below.

264. *Postal Operations Case* and *Library Science Case*, note 262, above.

265. See below, Chapter 12.

266. *Postal Operations Case* and *Library Science Case*, note 262, above. In the *Education Case* (1973) Conciliation Board file 190–2–25, the Chairman of the PSSRB expressed a doubt about the referability of such a proposal, but commented that the parties had not addressed themselves in argument to a part of a general proposal in its relation to union activity. He suggested that if either of the parties wished to pursue the matter further, it could apply for clarification. No such application was made.

267. See Chapter 8, p. 387 ff., below.

268. *Postal Operations Cases* (1968) Conciliation Board file 190–2–1; (1978) Conciliation Board file 190–2–63; and (1980) Conciliation Board file 190–2–86.

269. *Postal Operations Cases* (1978) Conciliation Board file 190–2–63; (1980) Conciliation Board file 190–2–86.

270. See below, Chapter 12, note 4.

271. *Communications Case* (1969) Arbitral Awards file 185–2–5 (a proposal for joint consultation, in which one of the items to be discussed was check-off); *Economists Case* (1970) Arbitral Awards file 185–2–13.

272. *Letter Carriers Case* (1978) Mediation Board file 191–2–90 (a proposal that the term employees must pay union dues from their first month on the job). The Rand Formula is now a standard provision in all agreements.

273. *Commerce Case* (1977) Arbitral Awards file 185–2–158. Although no clause of this nature has been included in the agreement for the commerce unit, the following clause appears in the agreement between the employer and the Professional Association of Foreign Service Officers, a bargaining agent that has specified reference to arbitration as the applicable dispute-resolution process:

> In view of the difficulties that may arise in communications with employees on foreign service, the Employer agrees to cooperate in providing facilities for communications between the Association and employees serving abroad.

274. *Data Processing Case* (1980) Conciliation Board file 190–2–88.

5: Consultation

We should be ignoring an important element in the relationship between the parties if, in our emphasis on collective bargaining, we failed to take account of some of the consultative mechanisms that have evolved as an adjunct to formal negotiation procedures. In a real sense these mechanisms are supplementary to any discussion on the scope of bargaining in the federal public service. Indeed, as we shall see,[1] consultation will be the only means by which the bargaining agents will be able to carry on any form of negotiations with the employer as long as the Public Sector Compensation Restraint Act remains in effect in its application to any particular bargaining unit.

The National Joint Council

As we noted in Chapter 1, the Preparatory Committee believed that notwithstanding the establishment of an elaborate and formalized system of collective bargaining, it would be desirable to preserve the National Joint Council (NJC) "as a forum for the systematic study and discussion of problems that transcend those of particular bargaining units."[2] To this end the Council adopted, in May 1967, a new constitution that redefined its functions in the light of a new collective bargaining regime. The duties of the reconstituted Council, as set out in this constitution, were as follows:[3]

> To consider any and all matters which by decision of the Council are considered to serve the purpose for which the National Joint Council is established excluding matters involving rates of pay, standard hours of work, leave entitlements and related conditions of employment that are the subject matter of arbitration procedures, and any other matter that is the subject matter of collective bargaining procedures. . . .

The constitution contained an exception to the limitation: the Council could consider any bargainable matter that was referred to it by agreement of the parties. However, the Council remained legally a 'recommending' rather than a 'determining' body, even though quite a few matters dealt with at the Council level during the first decade after the Public Service Staff Relations Act (PSSRA) came into force fell within the scope of bargaining on a unit-by-unit basis. Where 'agreements' were reached at the Council level, it did not follow that they were afterwards incorporated in the several collective agreements; complaints about the non-observance of Council agreements not so incorporated could not be pursued to adjudication.

In 1978 the employer and the bargaining agents who participate in the work of the NJC took important steps[4] to make the Council a more effective institution.[5] On 12 April 1978 the first set of by-laws of the NJC was approved by the Official Side (who are senior administrative officers in the public service) and the Staff Side (made up of one representative from each employee organization certified as bargaining agent for one or more bargaining units). The by-laws have since been amended on 8 December 1978 and 4 June 1980. Under a constitution approved by the Governor General in Council and adopted in the by-laws, the NJC consists of representatives of the Official Side and representatives of the Staff Side. The officers representing the Treasury Board are appointed by the President of that Board; the officers representing participating separate employers are appointed by the chief executive officer of the respective separate employers. The representatives of the Staff Side are named by the respective bargaining agents. The number of representatives of the Official Side is not permitted to exceed the number of representatives of the Staff Side. All bargaining agents, with the exception of the Canadian Union of Postal Workers and the United Food and Commercial Workers Union,[6] were members of the Council immediately before the Canada Post Corporation Act came into force; after that, bargaining agents representing exclusively employees in the

Post Office ceased to be represented on the Council. Of the separate employers, only the Office of the Auditor General and the National Research Council are represented. The Chairman of the Council is appointed by the President of the Treasury Board and must be one of the members of the Official Side. A Co-Chairman is elected by the representatives of the Staff Side from among their members. The constitution of the Council provides for the selection by the Council of a General Secretary who is not a member of the Council; the General Secretary serves on a full-time basis. Meetings of the Council are to be held regularly each quarter, and special meetings may be held on the call of the Chairman and of the Co-Chairman. Decisions of the Council are to be arrived at by agreement between the two sides. In addition to the duties set out earlier,[7] the constitution provides that:[8]

> The Council may make recommendations on any matter considered by it to the appropriate executive body of the government and such executive body shall advise the National Joint Council within reasonable time of the executive action to be taken thereon including, if any recommendation of the Council is not accepted, the reason for its not being accepted.

The NJC's by-laws call for the establishment of an Administrative Committee consisting of the Chairman and the Co-Chairman of the Council and the Vice-Chairman of both the Official Side and the Staff Side. The General Secretary serves as Secretary of the Administrative Committee, but he is not a member of the Committee. In addition other committees may be established by the Administrative Committee with the agreement of the Council; it is the Administrative Committee that gives the other committees their terms of reference. Under the Council's by-laws as amended in June 1980, there are three ways in which a subject or item may be referred to the Council for consultation:[9]

(a) through the cyclical review process, in accordance with a schedule agreed upon in the NJC
(b) by direct referral, by the Staff Side or the Official Side, either through the Administrative Committee or directly to the NJC at a regular or special meeting, and
(c) where required by the terms of reference of a Committee.

The cyclical review schedule, as of 2 December 1981, lists the following items: uniform and clothing policy, travel directive, relocation directive, commuting allowance, isolated posts directive, charges for Crown-owned living accommodation, and foreign service directives. These items are normally reviewed on a three-year cycle, but meal and mileage allowances under the travel directive are subject to review every six months, and the living-cost differential allowance and environmental allowance under the isolated posts directive are now subject to an annual review.

As we have seen, the by-laws anticipate that some matters referred to the Council may be bargainable under the PSSRA. The reason those matters may be referred is usually that it is not appropriate for a large number of separate bargaining units to bargain collectively for conditions that could, when developed, apply to all or most public servants, and indeed ought to apply in that fashion. However, some bargaining agents may not be prepared to leave a particular matter to be dealt with at the Council level. The by-laws accordingly provide an opportunity for each bargaining agent to determine whether it will participate in the bargaining process with regard to a particular matter. Thus, where a matter is referred to the NJC, it is to be dealt with by an appropriate *ad hoc* or standing committee unless any bargaining agent states in writing that it wishes to reserve the right to deal with the matter at the bargaining table rather than through NJC consultation. If a bargaining agent does not opt out within a fixed time limit, it is deemed to have undertaken to refrain from making a collective bargaining proposal concerning the relevant matter for a period of two years or for the cyclical review period, whichever is the longer, in respect of all the bargaining units for which it is the certified bargaining agent. If a bargaining agent makes a proposal in bargaining concerning a matter that may be included in a collective agreement and that is deemed to be suitable for NJC consultation, it is considered to have opted out of such consultation and must forgo any benefit or privilege deriving from such consultation on the relevant matter for the period referred to above, in respect of all the units for which it is the certified bargaining agent. A bargaining agent that opts out, or is deemed to have opted out of consultation and that subsequently wishes to opt back into consultation may be permitted to do so on expiry of the period referred to above, provided it agrees to re-open all relevant collective agreements to remove any clause dealing with the substance of the matter discussed in the NJC. After the views of the bargaining agents have been obtained in the manner indicated, the Chairman of the Official

Side is entitled to declare whether the Official Side agrees to consult. Needless to say, if the Official Side does not agree to consult, the bargaining agents are free to bargain on the matter in the regular fashion.

The parties have now gone even further. By a memorandum of understanding approved on 6 December 1978, they devised a formula for making binding, as part of collective agreements, some understandings reached at the NJC level. The memorandum, as revised on 5 March 1980, reads in part:[10]

> **a)** The parties . . . agree that National Joint Council (NJC) agreements on NJC items which may be included in a collective agreement will form part of all collective agreements to which the Treasury Board, Separate Employers participating in the NJC and Staff Side organizations are parties if they have endorsed the NJC agreement and provided the following clause is part of the collective agreement:
>
> "Agreements concluded by the National Joint Council of the Public Service on items which may be included in a collective agreement, and which the parties to this agreement have endorsed after December 6, 1978, will form part of this collective agreement, subject to the Public Service Staff Relations Act (PSSRA) and any legislation by Parliament that has been or may be, as the case may be, established pursuant to any Act specified in Schedule III of the PSSRA.
>
> NJC items which may be included in a collective agreement are those items which parties to the NJC agreement have designated as such or upon which the Chairman of the Public Service Staff Relations Board has made a ruling [on the basis of a provision of the memorandum of understanding to be discussed below]."
>
> **b)** Until such time as all collective agreements are modified to contain the clause referred to in **a**), the parties . . . agree that agreements endorsed by the NJC on items which may be included in a collective agreement will:
>
> (i) contain the following clause:
>
> "The parties . . . endorse this National Joint Council agreement and recognize that this agreement is part of the current collective agreement reached between them."
>
> and
>
> (ii) be signed by the Chairman of the Official Side, on behalf of the Treasury Board, a representative of Separate Employers endorsing the agreement and, the representative of each NJC participating Staff Side organization, on behalf of all their bargaining units.

Attached to the Memorandum is an annex stating that:[11]

> Items which at present are the subject of NJC consultation and which may be included in a collective agreement include the following:
> — provision of clothing;
> — first aid training;
> — first aid allowance;
> — Commuting Assistance Allowance;
> — Travel Directive;
> — Relocation Directive;
> — Disability Insurance;
> — Group Surgical-Medical Insurance;
> — provincial health cost sharing;
> — Isolated Posts Directive;
> — Government Accommodation and Living Charges;
> — Decentralization and Relocation Guidelines;
> — Labour Relations Training;
> — Foreign Service Directives.

It will be noted that all these items are of service-wide interest. The parties agree to consider whether any particular NJC item could be included in a collective agreement before the commencement of consultation and, if an impasse arises, the Chairman of the Public Service Staff Relations Board (PSSRB) is requested "to determine the issue pursuant to the provisions of the PSSRA."[12] Presumably, if the Chairman determines that the item cannot be included in a collective agreement, the determination would not bar consultation to see if the parties could reach a 'non-binding' understanding; that is to say, that if the understanding reached were not observed, its non-observance could not lead to adjudication of a grievance. Up to the beginning of December 1981, NJC-endorsed agreements have been entered into with respect to all the items listed in the cyclical review schedule[13] mentioned above, with the exception of the commuting allowance. In addition an agreement on withdrawal from work in the event of imminent danger has been endorsed. Early in 1983, an NJC-endorsed agreement was entered into with respect to the safety standards and procedures governing the organization and operation of joint safety and health committees.

The memorandum of understanding brings the consultation process on bargainable items even more closely in line with the bargaining process by providing for a 'freeze' of NJC-endorsed agreements after notice to bargain is given until the bargaining process is exhausted.[14] The memorandum reads:[15]

> The parties hereunder agree that when notice to bargain is given, NJC endorsed agreements shall constitute a term or condition of employment applicable to employees represented by the Staff Side organizations who are parties to the NJC endorsed agreement, as if such term or condition of employment was embodied in the collective agreement prior to the giving of notice to bargain.

In view of the scope of the consultation process established under the by-laws and the memorandum of understanding, there may be need from time to time for some sort of third-party intervention. The by-laws therefore provide that where an impasse arises within an NJC committee on a matter referred to it for consultation, and the impasse cannot be resolved through the efforts of the appropriate committee or those of a special *ad hoc* committee appointed by the Administrative Committee of the Council or by the Administrative Committee itself, the Administrative Committee is to refer the matter to a mutually acceptable mediator.[16] The recommendations of the mediator, which may be modified by the Administrative Committee, are to be referred back to the NJC committee where the impasse arose and are ultimately to be forwarded, together with the recommendations of the latter committee, to the NJC. If the impasse remains unresolved after the foregoing procedure is exhausted, "the subject or item shall be deemed to have been removed from the NJC consultation process and both the employer and the Bargaining Agent will be free to take whatever course they individually deem appropriate."[17] By an amendment to the by-laws enacted in June 1980, a similar procedure has now been provided for dealing with a request by a bargaining agency or a department/agency "seeking an interpretation or clarification of any directive, policy or regulation which has been the subject of NJC consultation and adoption and which has been approved by the appropriate executive body of the government."[18]

One of the problems relating to understandings reached at the NJC level that were not incorporated in collective agreements was that there was no third-party procedure for disposing of grievances arising out of alleged non-implementation of directives issued by the employer or by deputy heads concerning such understandings. Such grievances may be presented under the provisions of the PSSRA since they relate to the interpretation or application to an employee of a provision of a directive made or issued by the employer that deals with terms and conditions of employment. However, they could not be referred to binding adjudication.[19] Two provisions of the new by-laws of the NJC deal with the situation as far as future NJC agreements are concerned. One source of bargaining agents' discontent is removed by the declaration in the by-laws that "alleged cases of misinterpretation or misapplication of NJC agreements . . . are to be resolved on the basis of the original directive, regulation or policy developed and endorsed in NJC consultation, rather than on the basis of departmental versions of such documents." In addition a comprehensive redress (grievance) procedure is laid out in the by-laws; its final step consists of reference of the grievance to adjudication in accordance with the provisions of the PSSRA.

Other Forums for Consultation

The Public Service Employment Act and the Public Service Superannuation Act

Consultation between bargaining agents and the government or governmental institutions is called for under two federal statutes: the Public Service Employment Act and the Public Service Superannuation Act. The former statute provides that:[20]

> The [Public Service] Commission shall from time to time consult with representatives of any employee organization certified as a bargaining agent under the *Public Service Staff Relations Act* or with the employer as defined in that Act, with respect to the selection standards that may be prescribed under [the Act] or the principles governing the appraisal, promotion, demotion, transfer, lay-off or release of employees, at the request of such representatives or of the employer or where in the opinion of the Commission such consultation is necessary or desirable.

In determining the basis for the assessment of merit in appointment or promotion, which is an aspect of appointment, the Public Service Commission (PSC) may prescribe selection standards relating to education, knowledge, experience, language, age, residence or any other matter that, in its opinion, is necessary or desirable, given the nature of the duties to be performed. For about a decade after 1967, much of the consultation process under the foregoing provision was conducted on an informal basis. Indeed the first mention of consultation in the PSC's annual reports is to be found in the 1976 report in a bare reference to the PSC's obligation to consult with the bargaining agents.[21] In the development of selection standards during the first few years after the PSSRA came into force, the practice was for officials of the PSC to meet with representatives of a particular bargaining agent in order to go over the first drafts of a particular group standard. By 1970 the practice had changed, and the drafts were sent to the bargaining agent concerned for verbal or other response.[22] In addition, from 1974 onward, discussions were held from time to time on staffing-related problems or changes in a regulation under the Public Service Employment Act and on revision of that Act itself. On an even less formal level, an official of a bargaining agent would discuss with the PSC a particular problem, actual or potential, associated with a PSC policy. The PSC also consulted with management on overall management in the public service, but it does not appear that there was any input from bargaining agents in these consultations. The bargaining agents forcefully expressed their dissatisfaction with the arrangements for consultation, which they regarded as too haphazard to meet their needs.[23] The PSC's annual report for 1977 cautiously acknowledged the legitimacy of the bargaining agents' concerns. It stated:[24]

> Since decisions affecting the careers of individual public servants result not only from Public Service Commission policies and practices but also from management and staff association policies and practices, the need for effective consultation must be taken fully into account.

In November 1978 the consultation process was formalized, and a Joint Consultation Committee of the PSC was established. The purpose of the Joint Consultation Committee as set out in its terms of reference is:

> To establish a forum for Public Service Commission, Public Service bargaining agents and Departmental Representatives to discuss PSEA matters of common concern and interest and to exchange information and views. . . .
> Such a forum will:
> (a) provide unions and departments with an opportunity for input into the Public Service Commission's ultimate decisions and actions;
> (b) provide the PSC with the opportunity to brief unions and departments on new developments and generally provide for automatic feedback on problems encountered as well as means for disseminating information to the parties concerned.

Concerning the topics of consultation, the terms of reference provide that "upon request, the parties may consult on any matter falling under the PSEA or any related subject of mutual concern." However, individual cases are to be referred to the appropriate branch of the PSC. The PSC has always made it clear that it has the 'last word' concerning its responsibilities under the Public Service Employment Act, no matter what consultations may take place. The terms of reference accordingly declare: "While consensus may often result from [the discussions in the Joint Consultation Committee], none of the parties will be bound by Joint Consultation Committee (JCC) views; however, all will be in a position to discharge their responsibilities in the light of the knowledge acquired of [one another's] views." The JCC consists of the Public Service Commissioner, with the Directors General of the Commission, when appropriate, up to six Deputy Ministers, for whom Assistant Deputy Ministers may be substituted when necessary, and heads or senior individuals of the bargaining agents. The JCC is to meet on an 'as needed' basis, but not less often than once a quarter. Among the matters that have been discussed in the JCC since it was established are proposed changes in the Commission's regulations on probation; reverse order of merit in lay-off; term appointments, including appointments for a term of six months or less; priority lists; staffing-officer appointments; imperative staffing; rejection on probation; transfer policy; disclosure of information to unsuccessful candidates in competition; and a complete review of the regulations of the PSC in order to consider having them reworded for clarity and the elimination of redundancies. Some considerable progress has been made on all these items; the matter of term employees has been cleared up, and some headway has been made on disclosure and on the regulations. However that may be, the bargaining agents are not entirely happy with the situation because the ultimate authority to make changes remains with the Commission.[25]

The Public Service Superannuation Act (PSSA) provides that the Governor in Council may establish an Advisory Committee, to consist of twelve persons appointed by the Governor in Council after consultation with the National Joint Council of the Public Service of Canada; each member of the Committee is appointed for a term of no longer than three years "to advise and assist the Minister [that is, the President of the Treasury Board] on matters arising in connection with the administration of this Act."[26] In practice the Co-Chairmen of the Official and Staff sides of the NJC both recommend possible appointees to the Advisory Committee. Traditionally the members of the Official Side have generally been representatives of the Departments of Justice and Insurance, the Treasury Board, the PSC, and a senior official of at least one operating department. The members of the Staff Side have consistently been senior officials of the larger staff associations. In addition to official members, a representative of the Federal Superannuates' National Association has been permitted for several years to attend meetings as an observer when the Committee is considering matters that affect the benefits of those already retired. The meetings are also attended by observers who represent the Canadian Forces and the Royal Canadian Mounted Police when any items of common interest are under discussion.[27] In its early years the Committee was chaired by the Secretary of the Treasury Board and then, for a number of years following the creation of the Personnel Policy Branch, by the Deputy Secretary of the Treasury Board or a person of similar rank.[28] The Committee meets at the call of its chairman. The Committee's agenda have included some self-generated items, but are primarily devoted to matters referred to it by the President of the Treasury Board.[29] Since 1954 every significant legislative change has been referred to the Committee before the amending legislation was introduced in Parliament, although, as will appear below, it is impossible to ascertain the extent to which the views of the representatives of the staff organizations were reflected in such legislation.

The arrangements presently in force under the PSSA for consultation between the employer and the representatives of the employees limit the input of the latter group to participation in the Advisory Committee. The bargaining agents have criticized the operations of this Committee on several grounds: it does not include representatives of all the bargaining agents, and it is primarily confined in its discussions to matters placed on the agenda by the employer.[30] Another criticism voiced by the bargaining agents concerning the operations of the Advisory Committee is that the members of the Committee who are officers of staff organizations are not permitted to release to their own fellow officers the information given to them in the Committee. As A.D. Stewart, then president of the Public Service Alliance of Canada, has put it, "in a sense, in the truest sense, there is no consultation between the Treasury Board, as the employer, and the employee representatives." Mr. Stewart expressed the view that the President of the Treasury Board "only gets advice from a smaller body on the Superannuation Advisory Committee. And if I do get the figures there, and I say very strongly that all of the information must be provided through the Advisory Committee, I cannot in turn seek some advice either from the other officers, other executive bodies within the Alliance or directly from the membership. I cannot release it even after the fact. I cannot release what advice the Minister got from the Advisory committee".[31]

Provisions for Consultation under Collective Agreements

As in the private sector, many collective agreements made under the PSSRA contain provisions requiring consultation during the lifetime of a collective agreement. In many agreements the provisions are of a general nature; they acknowledge the common benefit to be derived from joint consultation and undertake that the parties will consult on matters of common interest and that the subjects of joint consultation will be determined by agreement of the parties. A number of agreements also contain a list, sometimes elaborate, sometimes limited to one specific matter or to several specific matters, on which consultation is to take place.[32]

Several decisions by adjudicators under the PSSRA have discussed the nature of the obligation to engage in consultation where such a process is called for by a collective agreement. In *International Brotherhood of Electrical Workers, Local 2228 and the Treasury Board*, E.B. Jolliffe, then Chief Adjudicator, held that[33] "Consultation is not the same thing as negotiation. There is no requirement that the Employer should negotiate and await mutual agreement before implementing [changes]. . . . The requirement [is] that the Bargaining Agent should be consulted." He commented:

> It has often been said that such consultation must be "meaningful". The question may be asked: why should there be any need for consultation, when the Employer is at liberty to make changes unilaterally with or without consent of the other party? The question, I think, deserves an answer.
>
> It is fallacious to assume that because the ultimate result is thought to be inevitable . . . consultation becomes unnecessary and superfluous. There is a rationale for consultation which ought to be more seriously considered. Many misunderstandings about the employment relationship could be avoided if adequate advance notice were given and the reasons for contemplated changes

> discussed fully and frankly, not only between the Employer and the Bargaining Agent but also between the Bargaining Agent and the employees. This consideration is of special importance when the employees affected are scattered in certain isolated posts throughout vast areas of northern Canada. It is highly undesirable that they should be taken by surprise when important changes in the terms of their employment are made.

In *Council of Postal Unions and the Treasury Board (Department of the Post Office)*,[34] W.S. Martin, then Chief Adjudicator, said:

> In simple terms, the word "consult" means the seeking of views. Within a collective bargaining context the word "consult" means full disclosure in communications with the representatives of the other party prior to the formulation of decisions with a view to ascertaining the full implications of the contemplated actions upon the vested interests represented through the other party. . . .
>
> The Union had the right to insist that [its] views be sought before management decisions were made. Evidence led on behalf of the Employer attempted to say that even though the decision had been made, it was not irrevocable and was susceptible to change. This is tantamount to saying, we have already made up our minds, but under the collective agreement we have got to go through the motions of listening to what you have to say. . . .it becomes quite clear that you cannot have meaningful consultation when there are justifiable suspicions that decisions have been made and reduced to orders distributed to the senior administrators in the field.

The provision of the collective agreement under consideration in this proceeding required the employer to consult with the Council of Postal Unions or its member unions about *contemplated* changes in conditions of employment or working conditions not covered by the agreement. The Chief Adjudicator held:[35]

> The use of the word "contemplated" must mean that the Bargaining Agent has the right of consultation, when the Employer seriously has under advisement a plan of change, at the embryo stage. The use of the word "contemplated" by the parties in the collective agreement must have a realistic meaning capable of interpretation within the accepted terminology of union-management relations. I interpret the word "contemplated" as signifying not a mere possibility, however remote, in the minds of management representatives, but a likelihood, reasonably discernible by the Post Office officials, that a proposed change, from a *prima facie* point of view, is within the ambit of probable occurrence. The use of the word "contemplated" must mean that the Employer's obligation to consult occurs long before precisely

> formulated plans for change are issued to senior employer representatives.

Where the collective agreement contains a consultation provision, but does not spell out the level at which consultation must take place, the PSSRB held in the *Postal Operations Case No. 7*[36] that consultation must be held between persons "vested with authority for that purpose by each of the respective parties. Neither party is entitled to determine what officers or officials of the other are vested with such authority or what officers or officials of the other are entitled to participate in the discussions that are held". Prior to the adoption of the memorandum of understanding discussed earlier in this chapter, the employer contended on a number of occasions before adjudicators that its obligation to consult with a bargaining agent, where such an obligation was embodied in a collective agreement, was satisfied if the matter was discussed at the NJC level. Adjudicators have invariably rejected this contention. In *International Brotherhood of Electrical Workers Local 2228 and Treasury Board*, E.B. Jolliffe, Chief Adjudicator, said:[37]

> The functions of the National Joint Council, itself a consultative body, should not be confused with the rights and obligations of the Employer and a bargaining agent arising under a collective agreement. A collective agreement in the public service has a status of its own, which has been recognized by statute. If an agreement contains a provision that one party must consult the other party before taking certain action, that provision means exactly what it says. In my view, neither party can satisfy that obligation by showing after the event that at some other place and some other time the matter was mentioned or discussed between the Employer and a number of bargaining agents meeting collectively to discuss matters of general interest.[38]

Labour/Management-Consultation Committees

Labour/management-consultation committees have been regarded as affording a valuable channel of communication between management and employees and are accepted as an aspect of an ongoing collective bargaining relationship as long as they do not take away management's decision-making rights or weaken the role of the bargaining agent as negotiator and administrator of the collective agreement. Some collective agreements in the federal public service provide for the establishment of such committees at the national level, and some at the local level or both.[39] In addition labour/management committees have been established in many departments and agencies without 'contractual' provisions of this sort.

On 5 June 1967, shortly after the PSSRA came into force, the Secretary of the Treasury Board informed department heads and heads of agencies that the Board was "aware of the contribution that joint consultation can make at all organizational levels, as a supplement to the more formal collective bargaining relationship that will soon be established", and that the Treasury Board was about "to consult with employee organizations certified as bargaining agents with a view to the development of a framework of policy in this area that will permit the establishment of joint consultation arrangements throughout the service wherever the representatives of the employer and the bargaining agents concerned agree that such arrangements will serve a useful purpose." The department heads and heads of agencies were advised that they should not undertake to establish joint committees on their own initiative in advance of a policy directive from the Treasury Board because policy in this area would have to be capable of service-wide application. In September 1971 the Treasury Board issued *Guidelines for Union-Management Consultation Committees*, and these have been revised on several later occasions. As revised in April 1980, the *Guidelines* declare:[40] "It is the policy of Treasury Board as the 'employer' to co-operate in establishing and actively supporting effective union-management consultations within the Public Service." The term 'consultation' is defined in the *Guidelines* as:

> ...a process for seeking information, providing advice, exchanging views on specific matters and discussing problems. Union-management consultation does not imply unanimous or majority agreement, nor does it in any way interfere with management's authority or its obligation to manage, or a union's legal rights established by the Public Service Staff Relations Act or applicable collective agreement.

The *Guidelines* state that:

> All matters may be subject to consultation, except:
> (1) those which modify basic operating policies;
> (2) those which could lead to altering or changing the intent of a collective agreement;
> (3) those for which other formal channels of communication have been established.

It is suggested that "it would not be normal practice to have grievances introduced at a consultation meeting. However, the problem giving rise to the grievance, if it is of general application and if it may lead to additional grievances, might be the subject of local consultation." On the other hand, the *Guidelines* stress that the general flow of communication should not be inhibited because of what might be regarded as a technicality.

The *Guidelines* suggest that management should be represented by the local manager and local chief of personnel or local officers assigned to equivalent positions, and that unions should be represented by officers of the bargaining agent or employees appointed by the bargaining agent. Meetings should be held at least once every two months. A list of suggested topics suitable for consultation is set out in the *Guidelines* as follows:[41]

(1) planned change in departmental programs and equipment;
(2) occupational health and safety (if no separate committee is established), protective clothing, fire prevention and protection;
(3) physical working conditions;
(4) equipment, tools and uniforms;
(5) training programs;
(6) suggestions award plan;
(7) implementation of the parking policy;
(8) scheduling of annual leave;
(9) recreational programs;
(10) internal communications.

In the 1975 revision of the *Guidelines*, an additional topic had been added and is still included in the *Guidelines*. This topic was developed by the Physical Working Conditions Committee of the NJC and was endorsed by the NJC; it consists of the matter of office accommodation, "particularly on those occasions when occupancy of a new or renovated office accommodation is planned which could result in a major change in existing physical arrangements for the employees concerned."[42]

Departments are encouraged to utilize the service of Labour Canada during initial establishment of consultation committees, but the *Guidelines* suggest that the involvement of Labour Canada should cease after joint consultation is effectively under way.

An account of the development and functioning of labour/management committees in the Department of National Defence provides an example of how such committees operate. In that Department an arrangement for the establishment of such committees was worked out between the Department and the Union of National Defence Employees, a component of PSAC, the bargaining agent for most of the employees in the Department; committees of this sort have been functioning since early 1970. The arrangement was subsequently cleared with bargaining agents representing other employees in the Department,[43] and the terms of the arrangement have been included in the Department's policy manual. At the present time, labour/management-relations committees function in virtually every base and station maintained by the Department across the country. The committees consist of representatives of management and representatives of employees designated by the unions. Where employees at any location are represented by two or more bargaining agents, representatives of all bargaining agents are invited to sit as members of the committee. Where difficulties are encountered in setting up a committee involving two or more bargaining agents, separate or supplementary consultation committees may be formed. The purpose of the committees is set out in the 'terms of reference':

> The purpose of these committees is to continue to provide a forum for the free and frank exchange of information on any matter or subject between management and employee representatives at the National or Local level. Such discussions may include matters of policy, conditions of employment, new programs, and other matters of mutual interest and concern. LMRC's shall provide the opportunity for management to discuss changes, practices or procedures that have an impact on employees.

There is no limitation on the matters that may be discussed at meetings of a committee, but committees have no authority to amend any provision of a collective agreement or regulations affecting employees' terms or conditions of employment or to make unofficial interpretation of the provisions of an agreement or regulation. However, discussions may bring to light problems in these areas, which either side may refer to higher authority. The 'terms of reference' suggest that the management side include the commanding officer or his delegate and that the union side include the local union president, but this principle has not been universally observed. In September 1977 the arrangement in the Department was extended to provide for a national committee as well as the local committees that had functioned previously. The national committee includes the Assistant Deputy Minister (Personnel), several Associate Deputy Ministers, the Union National President (that is, the National President of the Union of National Defence Employees), and one or more Union National Vice Presidents. Meetings of the

National Committee are held on a regular basis; local committees usually meet on a monthly basis. Each side is entitled to inform the committee secretary of the items that it wishes to have included on the agenda. To stimulate initiative by management in this regard, the Assistant Deputy Minister (Personnel), in October 1977, provided commanding officers with an extensive list of suggested topics for consultation, a list that is much more extensive than that set out in the *Guidelines* referred to earlier. The list is as follows:

> *Directives which Impact on Civilian Employees*: Treasury Board circular letters, Public Service Commission bulletins, Department of Supply and Services administrative letters, Departmental civilian personnel directives and administrative orders.
>
> *Departmental Programs*: changes in departmental programs, suggestion award plan, civilian training, alcoholism and drugs, language training, safety and accident, security, data stream, issue of uniforms, hand tools provision, pre-employment and periodic medical examinations, technological change, planned change in equipment.
>
> *Working Conditions and General Topics*: physical working conditions, rest and lunch room facilities, planned social activities, hours of work, shift schedules, overtime (scheduling, assignment of), notice boards (union use of), premises of employer (union use of), united fund, Canada savings bonds, credit unions, blood donor clinics.
>
> *Leave*: scheduling of leave, stand-down due to weather conditions abuse of such leave, educational leave, carry-over of vacation leave, special leave, illness in the family, injury on duty leave.
>
> *Departmental Procedures*: lay-offs (order of release), security, employee appraisals (PER), standard of discipline, complaints and grievances, travel status – standards and entitlements, accommodation (PMQs), transportation and parking, registering of attendance, internal communications, driving permits.

The arrangement for consultation on Departmental Procedures has resulted in an innovative approach to lay-off. In dealing with such situations, merit (assessed according to an agreed 'points' system based on performance appraisal) is to be the determining factor in the order of lay-off; seniority, measured according to an agreed scale, is to be given weight between employees of equal merit.

Several hundred district or local labour/management-consultation committees are now functioning in the public service, and efforts are being made to increase their number. In the main, the experience has been satisfactory. However, the effectiveness of such committees has varied from department to department and from region to region.

Union/Management Seminars

Union/management seminars, conducted annually since 1975 under the auspices of the NJC and attended by union and management officials to the highest levels, have provided the parties with an opportunity for off-the-record discussions on major problems and issues in a relatively relaxed and informal atmosphere. By and large, the seminars have been considered fruitful. In 1977 the NJC took a step to expand its role in the general area of labour/management relations by establishing a formal Labour-Management Relations Committee. The terms of reference of this Committee are now[44] as follows:

> Provide planning and organization for union-management seminars; review the results of such seminars and report significant developments and/or recommendations to the NJC.
> Provide advice and guidance to Staff and Official Sides on proposed departmental joint seminars as and when requested.
> To report to the NJC on the use made of joint seminars to further union-management relations.
> To investigate, monitor, and report on the use of Labour Canada's Management Consultation Programme; and to provide interpretation of policy intent on request.
> The terms of reference can be expanded by mutual agreement of the committee, subject to endorsement by the NJC.

Over the years since collective bargaining legislation came into force, union/management seminars have been conducted in a number of departments, in some areas on a regular basis and in others as occasion required. From discussions with the participants, it appears that the seminars have made a distinct contribution to the advancement of labour/management relations in the federal public service.[45]

The Impact of the Public Sector Compensation Restraint Act

As we noted in Chapter 1, above, the Public Sector Compensation Restraint Act (PSCRA) has put 'on hold' during the period that it remains in force — a period that varies for different bargaining units — most aspects of the collective bargaining process provided for under the PSSRA. However, section 7 of the PSCRA enables the parties to a collective agreement or the persons bound by an arbitral award made under the PSSRA to change, by common consent, any terms and conditions of the collective agreement or arbitral award other than wage rates or terms and conditions of the compensation plan. In addition subsection 6(3) of the PSCRA empowers the Treasury Board, in circumstances where an agreement or award expired before 29 June 1982 and no new compensation plan was established before that date, to change any terms and conditions of employment, including increases in wage rates not exceeding 9 per cent, in an agreement or award where the parties agree to change these terms and conditions. The PSCRA therefore contemplates some meeting of minds through "a process of consultation". The then President of the Treasury Board, the Honourable Donald J. Johnston, stated both during the debate on the PSCRA in the House of Commons and on a number of occasions in the course of his presentation on the legislation before the Miscellaneous Estimates Committee, to which the legislation was referred, that the NJC would be the vehicle for consultation on changes in terms and conditions of employment during the period while the Act remained in force. Indeed, during second reading of the PSCRA in the House of Commons, Mr. Johnston, said:[46]

> ...in the federal public service it is my view that most of the consultation which takes place at the National Joint Council can continue during the term that this bill would have application. As I have said before in the House, it is my hope and the hope of the government that that will be the case.

In the proceedings before the Miscellaneous Estimates Committee, Mr. Johnston dealt more specifically with the matters that could be dealt with in this fashion. He said:[47]

> Three specific items of discussion of the national joint council fall within the purview of Bill C-124. First, the bilingualism bonus, the allowances for first aid, and the employers' contribution to various health plans. These items may not be bargained during the term of the program, since they are considered compensation under this bill.
>
> Two other items negotiated at the national joint council level deal with measures which are partly within and partly without the purview of the bill: guidelines pertaining to foreign service, and those pertaining to isolated posts. Consultation within the national joint council would continue with respect to aspects of these items which are not subject to the bill.
>
> Nine National Joint Council matters do not fall under the purview of Bill C-124, since they are not compensation, as defined

> in the bill. The National Joint Council consultations will continue with respect to them. They include the reimbursement of legitimate travel and relocation expenses; protective clothing policy; living accommodation charges policy; withdrawal from work procedures policy; commuting assistance policy; retraining arising out the application of workforce adjustment procedures; and, most importantly, occupational health and safety issues.

Consultation, particularly in the NJC, is therefore likely to become a significant feature of the relationship between the employer and the bargaining agents during the next two or three years. However, the legislation does not provide for reference to the normal dispute-resolution processes during this period if the parties fail to agree. Certainly the point was not mentioned at any time during the discussion either in the House of Commons or in the Miscellaneous Estimates Committee. It would appear that there would be no bar to the intervention of a mediator in the consultation process as is presently provided for in the by-laws of the NJC.[48]

Notes

1. See below, pp. 239–41.
2. *Report of the Preparatory Committee on Collective Bargaining in the Public Service* (Ottawa: Queen's Printer, 1965), p. 40.

   For a discussion of the differences between consultation and bargaining, see Benjamin C. Roberts, Hideaki Okamoto and George C. Lodge, *Collective Bargaining and Employee Participation in Western Europe, North America and Japan*, Report of the Trilateral Task Force on Industrial Relations (New York: Trilateral Commission, 1979), which, while it speaks of employee participation, is equally applicable to consultation.

   For the views of some public servants regarding the consultation process before 1967, see J.E. Hodgetts, William McCloskey, Reginald Whitaker and V. Seymour Wilson, *The Biography of an Institution: The Civil Service Commission of Canada, 1908–1967* (Montreal: McGill-Queen's University Press, 1972), p. 165. (Hereafter referred to as *Biography*.)

   For a discussion of the operation of the process in the federal jurisdiction and of the efforts to formalize it, see L.W.C.S. Barnes, *Consult and Advise: A History of the National Joint Council of the Public Service of Canada 1944–1974* (Kingston: Industrial Relations Centre, Queen's University, 1975), Chapters 1–3 (hereafter referred to as *Consult and Advise*); S.J. Frankel, *Staff Relations in the Civil Service: The Canadian Experience* (Montreal: McGill University

Press, 1962), Chapter 3; J.E. Hodgetts *et al.*, *Biography, passim*; *Report of the Preparatory Committee on Collective Bargaining in the Public Service* (Ottawa: Queen's Printer, 1965), pp. 17–18; J.P. Connell "Collective Bargaining in the Public Service of Canada" in *Collective Negotiations in the Public Service* (Toronto: The Institute of Public Administration of Canada, 1973), pp. 45–47; R.M. Adams, "Collective Bargaining in the Canadian Public Service" in *Proceedings of North American Conference on Labor Statistics* (Washington, D.C.: U.S. Department of Labor, 1969), pp. 29–32; C.W. Rump, "Employer-Employee Consultation in the Public Service 1944–1972", 45 *Civil Service Review* (1972): 16; L.W.C.S. Barnes and L.A. Kelly, *Interest Arbitration in the Federal Public Service of Canada* (Kingston: Industrial Relations Centre, Queen's University, 1975), pp. 2–3; J.C. Anderson and Thomas A. Kochan, "Collective Bargaining in the Public Service of Canada", 32 *Relations Industrielles/Industrial Relations* (1977), pp. 245–46. See also Chapter 1, notes 27 and 29, above.

3. Barnes, *Consult and Advise*, p. 202.

4. In addition to the steps discussed in the following pages of the text, the employer and the bargaining agents entered into a 'De-Exclusion Agreement' that was discussed in Chapter 2, pp. 52–53, above.

5. In 1978 the NJC published its *First Annual Report* summarizing its accomplishments from 1944 to 1977 and significant events of 1977–1978. The then Co-Chairman (now General Secretary) of the Council was D.S. Davidge, an 'old-line' trade unionist, who was at the time the representative on the Council of the International Brotherhood of Electrical Workers. In an introductory statement to the *Report*, Mr. Davidge commented that "in the past, criticisms of the meandering, slothlike approach to certain areas of concern were well founded." However, he remarked: "As one who two years ago was a self-avowed critic of NJC . . ., I have now acquired a great respect for the organization and its accomplishments" (p. 3). Mr. Davidge added that the agreement reached between the Official Side and the Staff Side on the NJC by-laws and an attached "Memorandum of Understanding" (discussed on pp. 225–28, above) represented "one of the most dramatic changes in NJC since its inception in 1944."

6. Both of these organizations are or were eligible to name representatives to the Staff Side. The Council of Postal Unions chose not to be represented during the period when it was a certified bargaining agent, and the Canadian Union of Postal Workers took the same position after the dissolution of the Council of Postal Unions. The other member of that Council, the Letter Carriers Union of Canada, participated in the work of the NJC from the time of the dissolution of the Council until the Canada Post Corporation Act

came into force. The United Food and Commercial Workers Union was certified for a number of small units at various military posts in Canada and has not shown an interest in the work of the Council.

7. See above, pp. 221–22.

8. Barnes, *Consult and Advise*, p. 203.

9. *National Joint Council Constitution and By-Laws* (Ottawa: Minister of Supply and Services Canada, 1981), p. 14. (Hereafter referred to as *NJC Constitution*.)

10. *Ibid.*, pp. 34–35.

11. *Ibid.*, p. 37.

12. *Ibid.*, p. 35.

13. The format of the first agreement relating to the foreign service directives, entered into on 1 June 1979, in accordance with this procedure, contains a report of the Committee on the Foreign Service Directives. The report sets out the history and purpose of the Directives and the major changes and recommendations of the Committee; the recommendations are expressed in 'legislative language'. Attached to the recommendations is a statement that "the parties hereunder endorse this agreement and recognize that this agreement is part of the current collective agreement reached between them." The statement is signed by the Chairman, Official Side, on behalf of the Treasury Board, and the representatives of the National Research Council and the Office of the Auditor General, two of the separate employers, as well as by the representatives of the bargaining agents including, incidentally, the Professional Association of Foreign Service Officers, the bargaining agent most directly affected.

14. See below, Chapter 9, p. 416 ff.

15. *NJC Constitution*, p. 35.

16. The by-laws originally stipulated that the mediator should be a person "knowledgeable in the subject area and in the NJC consultation process", but these words no longer appear.

17. *NJC Constitution*, p. 20. Since these by-laws were adopted, there has been only one instance in which a mediator was appointed. The issue involved parking at the Booth Street complex in Ottawa.

18. *NJC Constitution*, p. 25.

19. For a discussion of the grievance and adjudication processes, see Chapter 11, below.

20. Subsec. 12(3).

21. P. 34.

22. It was not until 1978 that the bargaining agents began to be drawn into the consultation process at an earlier stage. In that year the

practice was introduced of inviting a bargaining agent to make comments and suggestions about three months before the PSC began to revise a draft.

23. See *Employer-Employee Relations in the Public Service of Canada: Proposals for Legislative Change* (Ottawa: Information Canada, 1974), Part I, p. 64. (Hereafter referred to as the *Finkelman Report*.)

24. *Ibid*., p. 7.

25. For recommendations for broadening the scope of bargaining to permit some of the matters that now lie within the jurisdiction of the PSC to be made subject to bilateral determination either in the regular bargaining process under the PSSRA or otherwise, see Chapter 4, note 127, above.

26. S. 31. This provision was first introduced in the Public Service Superannuation Act, S.C. 1952–1953, c. 47, s. 29. The enactment of the Civil Service Superannuation Act, S.C. 1924, c. 69, had been followed in 1929 by the establishment of a slightly smaller, non-statutory, advisory group. According to information supplied by the Pensions Group of the Treasury Board, "Although that early advisory group was to a degree involved with legislative and regulatory policies, it spent much of its time looking at individual cases and acting as an appeal body. . . . [After 1954] the Advisory Committee gradually stopped this emphasis on individual cases and began rather to look at the broad policy issues."

27. See the Canadian Forces Superannuation Act, R.S.C. 1970, c. C-9, and the Royal Canadian Mounted Police Superannuation Act, R.S.C. 1970, c. R-11.

28. The present chairman, Mr. J.J. Tenier, is the first person other than an official of the Treasury Board Secretariat who has served in this office. His current assignment is as Deputy Commissioner of the Foreign Investment Review Board, but he was Assistant Secretary of the Treasury Board when first appointed to the chairmanship of the Advisory Committee.

29. Most of the material in this paragraph is derived from information supplied by the Pensions Group, Treasury Board.

30. The *Finkelman Report*, Part I, p. 97, recommended that "Consideration should be given to the expansion of the advisory committee so that all bargaining agents would have an opportunity to be represented thereon. Consideration should also be given to providing an opportunity for the employee representatives on the advisory committee to introduce matters on the agenda for discussion."

31. Minutes of Proceedings and Evidence of the Standing Committee on Miscellaneous Estimates Respecting Bill C-12, an Act to amend the Supplementary Retirement Benefits Act, the Public Service Superannuation Act, the Canadian Forces Superannuation Act,

the Royal Canadian Mounted Police Superannuation Act, and the Members of Parliament Retiring Allowances Act, 1978–9, 2 March 1979, p. 9:19.

32. For further discussion on provisions for consultation during the lifetime of a collective agreement, see below, Chapter 7, pp. 313–16.

33. (1971) PSSR Reports M 2245 at M 2250-M 2251. See also *Public Service Alliance of Canada and Northern Canada Power Commission* (1971) PSSR Reports M 2255 at M 2262.

34. (1969) PSSR Reports M 389 at M 423-M 425.

35. *Ibid.* at M 424.

36. (1972) PSSR Reports K 978 at K 981. See also *Open Landscaped Offices Case* (1973) PSSRB file 148–2–11.

37. See above, note 33, at M 2249.

38. For a discussion of the problem whether an understanding arrived at through consultation can be incorporated in an existing collective agreement or arbitral award by way of an amendment, see Chapter 9, pp. 415–16, below.

39. See below, Chapter 7, pp. 315–16 ff.

40. Treasury Board, "Personnel Management Manual" (11 April 1980), pp. 1–2.

41. *Ibid.*, at 245–1, p. 9.

42. Open-office accommodation had become a rather controversial matter.

43. For example, the Federal Government Dockyards Trades and Labour Council (Esquimalt, B.C.) and the Federal Government Dockyards Trades and Labour Council East.

44. See *Fourth Annual Report of the NJC 1980–81*, p. 20.

45. In 1977 the Department of Transport and the Canadian Air Traffic Control Association began discussions to arrange a union/management seminar to explore problems that had arisen in their relationship. Bargaining between the employer and the Association for the renewal of their collective agreement reached an impasse before the seminar could be held. The impasse was ultimately resolved by the enactment of the Air Traffic Control Services Continuation Act, S.C. 1977, c. 57 (see Chapter 10, below), whereby the employees were directed to return to work. Despite the resentment generated among the members of the Association, who had been 'deprived' of the right to strike by the legislation, the Department and the Association agreed that the seminar should be held, and it was held early in October 1977. At this seminar both parties "vented their emotions", as one participant put it. It is, of course, impossible to determine the extent to

which the seminar contributed to the restoration of a sound relationship. However, after the seminar, two rounds of bargaining were concluded between the employer and the Association, without the intervention of a third party. In the first of these rounds, an agreement was reached before the previous agreement had expired, and in the second round agreement was reached shortly after the previous agreement expired.

46. *House of Commons Debates*, 15 July 1982, p. 19363.

47. Proceedings of the Miscellaneous Estimates Committee, 19 July 1982, pp. 88: 15 and 88: 16.

48. See above, p. 227.

6: The Collective Bargaining Process

Prelude to Collective Bargaining in the Federal Public Service

The staff-association movement in the federal public service dates back nearly a century. Postal employees were the first to organize, with the formation of the Railway Mail Clerks Association in 1889, followed by the Federated Association of Letter Carriers of the Dominion of Canada in 1891 and, finally, by the Canadian Postal Employees Association in 1911. By that time other groups of civil servants were being organized as well. The Civil Service Association of Canada, formed in 1907 and renamed the 'Civil Service Association of Ottawa' the following year, was the first to recruit its membership across departmental lines. When it merged, in 1958, with the Amalgamated Civil Servants of Canada, a union with a similar organizational structure, founded in 1920 in Western Canada, it reverted to its original name, the Civil Service Association of Canada (CSAC). The Civil Service Federation of Canada (CSFC), with which the CSAC would merge in 1966 to form the Public Service Alliance, was founded in 1909 as a loose alliance made up mainly of departmental associations, but for a time including also the Civil Service Association of Ottawa and the postal unions.

The Professional Institute of the Public Service (PIPS) was founded in 1920. Unlike many of the other associations, which went through mergers, break-ups and various forms of reorganization, PIPS has now passed the sixtieth anniversary of its founding with its original name and in its original form. PIPS joined with the CSAC and CSFC in a Conference on Unity in 1959, but withdrew a year later, having decided to retain its separate identity.

Some trade unions, as distinct from associations of civil servants, have long been active in organizing employees in certain service and maintenance operations. Councils of unions still in existence at the Printing Bureau and Navy Dockyards and made up largely of locals of international unions were exerting considerable influence on the determination of wages and working conditions as early as the 1940s.

The Parties to the Bargaining Relationship

The Bargaining Agents

The expeditious certification of bargaining agents after the enactment of the Public Service Staff Relations Act (PSSRA) may be explained in large measure by the degree of existing organization when the Act came into effect. As we have seen, many of the bargaining agents had existed, in one form or another, since the early part of the present century; others, like the postal unions, could trace their origins back even further. Most had already engaged in a consultative relationship with the government employer through the National Joint Council (NJC), which gave them not only implicit recognition, but also a considerable measure of financial security by providing for the check-off of membership dues.[1] The latter provision more than anything else had facilitated their organizational activities.

As of September 1981, nineteen employee organizations had been certified as bargaining agents in the federal public service.[2] Together they represented 122 bargaining units; eighty-one of these were made up of employees of the central administration, that is, the government departments listed in Part I of Schedule I of the PSSRA; the rest were distributed among the 'separate employers'.[3] These bargaining units cover a broad spectrum of occupations from those manned by relatively unskilled manual workers at the bottom of the occupational hierarchy to those staffed by highly trained, technical and professional personnel and foreign service officers at the top. The self-image and aspirations, the particular needs of the various occupational groups, and the clout they might exercise in case of a strike have combined to affect their bargaining demands and tactics. Some groups, such as the postal workers and air-traffic controllers, have been traditionally militant;[4] others have shown uncharacteristic militancy in recent years.

Of the nineteen bargaining agents in the federal public service, the Public Service Alliance of Canada (PSAC) is by far the largest. It represents over 169 000 of the 300 000 employees who bargain collectively under the PSSRA and fifty-seven bargaining units, more than any other bargaining agent in the public service. Treasury Board is the employer for forty of these units; the remaining seventeen are distributed among the 'separate employers'. PSAC is composed of a central administration and seventeen relatively autonomous components organized on departmental lines.[5] The Alliance Centre has primacy in the negotiation process because of the statutory requirement that national bargaining units be organized on an occupational group basis, but the components make a considerable contribution to the preparation and conduct of negotiations and are also largely responsible for the administration of the collective agreements at the departmental level, with greater or less assistance, as required, from regional representatives of PSAC. This structure is unique among the public service unions and represents a compromise between the different philosophies of organization of the Civil Service Federation (CSF) and the Civil Service Association (CSA) which, as we have mentioned, merged to form the Public Service Alliance of Canada. The components reflect the departmental style of organization of the CSF. The central administration, on the other hand, cuts across departmental lines, as did that of the CSA, thus permitting the Alliance to represent occupational bargaining units on a national basis as required by the legislation. An early decision of the Public Service Staff Relations Board (PSSRB)[6] recognized PSAC as one union for purposes of certification, thereby eliminating potential competition for recognition by its components. Accordingly, while the constitution of PSAC requires it "to delegate its responsibility to negotiate agreements to a Component on the request of the Component where all the members of a bargaining unit are within the one Component" (as might occur, for example, in certain units in the departments of National Defence or Agriculture), any pertinent collective agreement must be concluded on behalf of PSAC itself, as the certified bargaining agent.

In addition to their contribution to the formulation of contract demands, their responsibility for the administration of votes that specify dispute- resolution procedure, contract ratification, and so on, for the occupational groups in the department or departments within their jurisdiction, the components play an important role in administering collective agreements at the department level; they are also responsible for processing grievances under any collective agreement involving members in any department concerned, up to, but not including, grievances against a collective agreement at the adjudication level. The components also represent their members on matters such as classification problems and working conditions that are not covered in collective agreements and on matters that concern only members of particular departments. Each component has full-time elected officers and votes its own dues structure, but depends on PSAC for the collection and distribution of dues. The dues check-off, under the Rand formula, is payable to PSAC alone, as the certified bargaining agent.

The Alliance Centre has full responsibility for collective bargaining for all bargaining units for which PSAC has been certified as bargaining agent, subject to the provision for delegation in the particular circumstances mentioned above. It is also responsible, among other matters, for implementing all policies established in National Conventions and by the National Board of Directors; the latter is composed of the National Executive, the presidents of all the components, and representatives from each of the major geographic regions of the country. But in spite of the overriding responsibilities assigned to the central organization, PSAC's structure, from the outset, has contained elements of fragmentation. The centrifugal forces inherent in the component structure have been kept in check by three factors: the statutory provision for occupational bargaining units, the Board decision noted above,[7] which required that the Alliance be recognized as a single organization for the purposes of certification, and the exercise of central control over the collection of funds provided under its own constitution and enforced through the dues check-off provisions in the collective agreements it has negotiated. These factors are, in effect, the glue that holds the Alliance together.

In a sense this arrangement parallels the system, on the employer side, of departmental administration of collective agreements negotiated by Treasury Board. PSAC represents a wide variety of occupational bargaining units all of which chose the arbitration option for dispute resolution in the first round of bargaining, but some of which, representing 62 per cent of the membership of the Alliance, switched to the strike option in subsequent rounds.[8] The most dramatic of these switches were made by the general labour and trades units (GLT) in 1971, the clerical and regulatory unit (CR) in 1975, and the general services units (GS) in 1980. These are three of PSAC's largest units representing over 19 000, 47 000 and 12 000 workers respectively. While strikes by the GLT in 1975 and 1977 were disruptive, the strike in 1980 by employees in the clerical and regulatory unit had an even greater impact. For one thing, it was the first fully horizontal strike since the enactment of the collective bargaining legislation in that it affected virtually every department in the federal public service. For another, it represented a rather unexpected change in attitude and behaviour by a traditionally docile group, and a much more militant stance than the leadership of the Alliance itself had previously taken. Therefore the strike's symbolic effect, as well as its practical impact, were particularly significant.

Until the transformation of the Post Office into a Crown corporation removed Post Office labour relations from the jurisdiction of the PSSRA, the Canadian Union of Postal Workers (CUPW) and the Letter Carriers' Union of Canada (LCUC) were the next-largest bargaining agents in the public service. In September 1981 their membership totalled 23 391 and 20 106 respectively. Although CUPW is now generally recognized as the more militant of the postal unions, this was not altogether so at the outset of the collective bargaining era.[9] CUPW has had consistently turbulent relations with the employer and, as we shall see later, has sometimes succeeded in extracting concessions, through political 'end-run' tactics, far beyond the achievements of other bargaining agents. CUPW has been involved in more strikes — the majority of them unlawful — than any other bargaining agent and has brought more grievances to adjudication than all the other bargaining agents combined.[10] It is probably the only union in the country, either in the public or in the private sector, with a clause in its constitution prohibiting its officials from meeting alone with management representatives, during or outside negotiations.

While PSAC, CUPW and LCUC, as well as several smaller bargaining agents, are affiliated with the Canadian Labour

Congress, some important groups have preferred to be represented by bargaining agents not so affiliated.[11]

The Professional Institute of the Public Service (PIPS) is by far the largest of the 'independent' bargaining agents, representing approximately 21 000 employees in the service in thirty-five bargaining units. For twenty-six of these units, Treasury Board is the employer; the rest are distributed among the 'separate employers'. PIPS has a long history of organization as a professional association and represents a significant proportion of federal public employees, mainly in the scientific and professional category, who are members of the licensed professions or who hold other academic degrees.

PIPS is organized on an occupational basis that cuts across departmental lines. It combines thirty-one relatively autonomous occupational groups, each with its own executive, and all virtually identical in composition to the certified bargaining units. As we shall see below, the groups contribute significantly to the preparation and conduct of negotiations. However, like most other bargaining agents, including PSAC, PIPS is structured to take account of the various regions represented in its national bargaining units.[12] Predictably, all the bargaining units represented by PIPS originally chose the arbitration option as the ultimate method of dispute resolution. While a minority of PIPS affiliates have since switched from this option, few have exercised their right to strike; the only exceptions are the aircraft-operations unit, where employees have since changed their bargaining agent, and the nurses. A strike by meteorologists was settled in a matter of hours.

There have been three breakaways from PIPS in recent years. The groups involved were the economics, sociology and statistics unit, which now bargains through the Economists', Sociologists' and Statisticians' Association, and the aircraft-operations and translation units, now affiliated with the Canadian Union of Professional and Technical Employees (CUPTE), organized in 1978. This organization represents three units: the two units mentioned above and the radio-operations unit, formerly represented by PSAC. The first two units have struck in every round of bargaining since they came to be represented by CUPTE.

One of the strongest bargaining agents in the federal public service has been unaffiliated from the outset. Although relatively small in numbers, the Canadian Air Traffic Control Association (CATCA), consisting of 2100 members, enjoys greater political clout in negotiations than virtually all other bargaining agents, apart from the postal unions. This is because of its ability to disrupt air traffic — as it has done on a number of occasions through threatened strikes and slowdowns — or to bring air traffic to a virtual halt by means of a full-scale strike.

Of all the bargaining agents in the federal service, the Professional Association of Foreign Service Officers (PAFSO), also unaffiliated, is undoubtedly the most unusual. Its members are employed in the Departments of External Affairs, Industry, Trade and Commerce, and Employment and Immigration, and the majority of them are stationed outside the country.[13] Many of them, by the nature of their work and training, aspire to the ambassadorial or trade-commissioner level. Depending on their posting, they may move in or out of the bargaining unit several times during their careers. A strike by the employees in this unit is highly unlikely.

A Preponderance of Canadian-based Unions

The vast majority of the employees in the public service are represented by Canadian-based unions, most of whose membership is confined to employees in the federal public service. The *Syndicat général du cinéma et de la télévision* (SGCT), which represents employees of the National Film Board, is a Canadian-based union affiliated with the Quebec-based *Confédération des syndicats nationaux* (CSN). Some international unions or locals of such unions hold bargaining rights. This is the situation in a printing-operations unit, in the ship-repair units, and in most of the very small units of the Staff of the Non-Public Funds, Canadian Forces. A local of the International Brotherhood of Electrical Workers (IBEW), which represents the employees in the electronics unit, has attracted attention because of a PSSRB decision on the designation of 'essential' employees, a topic that will be discussed in Chapter 10, below.[14]

The Employer Side: Management Authority and Bargaining Structure

In contrast to the multiplicity of bargaining agents on the employee side, Treasury Board acts as the sole employer for purposes of collective bargaining with the eighty-one bargaining units of employees of government departments and agencies otherwise known as the 'central administration'. Meanwhile, in the shadow of Treasury Board, a handful of separate employers carry out negotiations with their own employees, who number altogether fewer than 5500 persons. While the statutory provision for a single locus of bargaining responsibility on the employer side for almost the entire public service was intended to facilitate effective bilateral relationships — and has, in fact, succeeded in this goal in large measure — some elements of multilateralism, inherent in the system, have surfaced in particular situations. As we shall see, there have been occasions, albeit rare, where the bargaining process has been extended beyond the primary negotiators either through the attempt of a bargaining agent to influence key individuals at senior levels in the Treasury Board hierarchy or at the political level, or on the initiative of some elected officials themselves. Since several levels of decision making exist within the Treasury Board and since political 'end-runs' are a possibility, even though one that is exercised rarely, the question of the employer's identity for the purpose of bargaining is not always as clear-cut in practice as the provisions in the statute would make it appear.

There are also complex multilateral relationships between Treasury Board and the various departments of government whose interests, like those of the separate employers, may differ considerably from those of the central authority that Treasury Board represents. The departments have varying degrees of input into the preparation and conduct of negotiations, although they are fully responsible in their own jurisdictions for the administration and application of collective agreements. In a few instances where individual departments have a monopoly of employment in a particular bargaining unit,[15] the bargaining has actually been carried out at the departmental level, under a mandate from Treasury Board, as permitted by subsection 7(2) of the Financial Administration Act. However, even where a department does not have a monopoly of employment, some department representatives, as we shall point out later in this chapter, are often included in the bargaining team. Although, under the system of delegated authority, the negotiating mandates of the departments required prior approval by Treasury Board, departments have occasionally, when the going got rough, exceeded their mandates, sometimes with ministerial approval, but without regard for the costs involved or the repercussive effects on other bargaining units. A senior departmental official experienced in bargaining under mandate recognized the Treasury Board's concern with the question of repercussive effects in a comment, "I only had to think of three thousand employees when I was negotiating; Treasury Board has to think of three hundred thousand."

All departmental negotiating mandates were withdrawn in the summer of 1980, following settlements with the postal unions, concluded with the intervention of the Postmaster General, that went far beyond Treasury Board guide-lines.[16] This now leaves Treasury Board as the only official employer spokesman for purposes of collective bargaining, although major user departments continue as before to contribute to the preparation for negotiations and representation on bargaining teams.

The Bargaining Context

It is a truism to say that collective bargaining does not take place in a vacuum. The state of the economy, internal and external relativities, the perceived need for catch-up by particular groups, the question of job security for other groups, the pattern set by other negotiated agreements, the history of the bargaining relationship between the parties, as well as the calibre of the negotiators at the bargaining table and the perceptions they have of one another, are among the many variables that can affect the climate of any particular set of negotiations and, consequently, their outcome, whether in the private or the public sector. In addition, however, some fundamental intersectoral differences create significant differences in the bargaining context which, in turn, have implications, not only for the climate of negotiations and the tactics of the parties, but for the actual substance of the negotiations and their outcomes.

Responsibilities of the Government Employer

Most of the intersectoral differences with implications for collective bargaining flow from the special nature of the government employer, notably its multiple functions and responsibilities. Not the least of these is the responsibility for providing the services for which the public has paid, particularly when these are monopoly services essential to public health and safety as well as to public convenience. The problem of dispute resolution will be treated in depth in Chapter 10. It is sufficient to note at this point that the requirement under the PSSRA that 'essential' services be maintained as a quid pro quo for the right to strike places constraints on union bargaining power that do not exist in the private sector. The fact, also, that one of the parties to the bargaining relationship has the power — albeit rarely used — to legislate an end to a dispute or to introduce changes in the existing rules of the game by amendments to the law must necessarily have some implications for the power equilibrium between them.

As we noted in Chapter 1, senior levels of government have been concerned, when granting collective bargaining rights to their own employees, to protect traditional managerial prerogatives, as well as the authority of Parliament, with respect to public policy issues. Accordingly, in contrast to the private sector, where the scope of bargaining is generally determined by the economic power relationships of the parties, the government employer in all jurisdictions places statutory limitations on the matters that can be negotiated. That these limitations are a distinctive characteristic of the public sector bargaining context and create significant implications for the substance of negotiations and their outcome, is apparent from the discussion in Chapter 4, above.[17]

Wage Determination: Inadequacy of the Private Sector Model

One of the most fundamental differences between the bargaining contexts of the private and public sectors is the difference in the economic constraints on the employer's bargaining position. Although the economic costs of agreement and disagreement are virtually the same for the unions in both sectors, they are very different on the employer side. In contrast to the private sector, where collective bargaining has evolved as an exercise in economic power relationships, the wage policy of a government is not tied to a profit position or to strict capacity to pay. This is particularly so at the federal level of government, where the tax base is broader and more flexible than at the provincial or municipal levels; in addition wages and salaries of the federal government account for a smaller share of the budget. When employee compensation is less than 20 per cent of total federal government expenditures,[18] the budgetary impact of a wage increase would not be too significant in itself. However, other considerations may affect the federal government's wage policy. Indeed, in introducing the Public Sector Compensation Restraint Act (PSCRA), the President of the Treasury Board gave as the principal reason for imposing controls in the federal public sector the need to set an example of restraint, both for the provincial public services and for the private sector. The following discussion of wage determination through collective bargaining is based on the situation prevailing before the PSCRA was enacted and to which, it is to be hoped, the parties will return in due course.

Where wages and other aspects of compensation are determined through collective bargaining, the costs of agreement do not have the same financial implications for the government employer as for the employer in the private sector. The cost of disagreement, that is, of a strike, may even represent a financial saving for the government. However, there may be serious social costs of disagreement which, in turn, may produce strong political pressures to settle. It has been suggested that political pressures on the public employer act as a substitute for the economic pressures to settle in the private sector bargaining model.[19] While some public service unions have indeed achieved higher-than-average settlements through occasional 'end-run' tactics (particularly in cases where a withdrawal of services would result in serious hardship and inconvenience to the public), a government cannot be expected to settle at any price. Although the profit constraints on the private employer do not exist in the public sector, other constraints do exist. The fact that wage increases for government employees come out of taxpayers' money may be seen as a combined political and economic constraint, particularly in view of the popular perception that government expenditures, employment figures and wages are out of hand. In addition the federal government has always been concerned with the risk of creating precedents that other levels of government, as well as employers in the private sector, could not afford to follow[20] or that, if they did follow, might have serious inflationary consequences. Among the federal government's overriding public responsibilities is its responsibility for the economy as a whole, particularly in a period when economic restraint is a major element of public policy. Accordingly, to avoid the potentially inflationary settlements that might otherwise result in the context of a collective bargaining relationship in which conventional economic constraints are lacking, the government has traditionally tied its compensation policy to average wages paid for similar jobs outside the public service.[21] Where the monopoly nature of certain public services precludes comparison with those of the private sector — the air-traffic controllers are a case in point — the policy has been to maintain historical relationships within the service. This policy, however, has found little favour with the unions concerned, particularly with one as militant as CATCA.[22]

The Comparability Principle

The principle of comparability, or at least lip service to it, was an important element of compensation policy in the federal public service long before the present collective bargaining regime was established. The history of official commitment to this principle, prior to the introduction of collective bargaining legislation, has been outlined by a Treasury Board official:[23]

> Such a principle may, for the Federal Public Service, be traced back to 1919, when the first system of classification and pay was introduced. It was then argued that Public Service compensation should be equitable, that is, "fair" to the employee and "fair" to the tax-paying public. Compensation, it was then held, should be sufficient to attract and retain the calibre of persons required to perform the work, but at the same time, in fairness to the public, should not exceed that paid for similar services by employers in the private sector. . . . Former Prime Minister Louis St. Laurent declared in 1950 that:
>
> > The Government policy on salaries in the public service has long been based on two main principles, first that they should be sufficient to attract to, and retain in, the civil service persons of the right type and that, considering all relevant factors, such as conditions of employment, salaries for each class of work should be generally in line with those paid for comparable work by good private employers.
>
> In 1958 another official compensation policy statement was made by Prime Minister John Diefenbaker. He stated that:
>
> > First, the salaries must be enough to do the job, that is to attract enough of the right kind of men and women into the service, they must be fair as between civil servants and people outside the service, the taxpayers if you will, which means that the salaries we pay for any class of work should be comparable with those paid by private employers for similar classes of work, taking into account the other terms of employment that are necessary to make a fair comparison.

With the adoption of the PSSRA in 1967, the principle of 'fair comparison' with the private sector, as well as between various parts of the public service, was embodied in law by the requirement, under section 68 of the Act, that among the factors to be taken into account in the rendering of an arbitral award were conditions of employment in similar occupations outside the public service and the need to maintain internal relationships between different occupations and levels.[24]

A decade later the federal government once again enunciated its commitment to the comparability principle, this time emphasizing the concept of total or aggregate compensation as the measure for comparison. The following statement appeared in a discussion paper published in 1977 on decontrol of the government's anti-inflation control measures and on post-decontrol issues:[25]

> The approach that the government intends to pursue in compensating federal public servants is one of average comparability of total compensation with a representative sample of private sector employers. It will do so in a manner which ensures that federal public service compensation will continue to follow compensation in the private sector.

Although the government continued to promote the concept of total compensation as a more appropriate measure of comparison than comparisons of wage rates *per se*, it was unsuccessful in its attempts to write this concept specifically into law. Bill C-28 and Bill C-22, in 1978, would have made aggregate compensation comparability with the private sector a mandatory criterion for arbitral awards.[26] Although both Bills died on the order paper after vociferous union objections, there can be no doubt that the compensation policy they reflected remained a major determinant of the government's bargaining position. One Treasury Board spokesman summed up the guide-lines for government negotiators as follows: "The message is loud and clear. 'Thou shalt not lead'." The principle of comparability was, of course, placed 'on hold' with the enactment of the PSCRA.

The Concern with 'Repercussive Effects'

It is evident from the foregoing that the federal government makes its bargaining decisions under different constraints than do employers in the private sector.[27] The fact, moreover, that the federal government negotiates as a single employer, through Treasury Board, with such a multiplicity of bargaining units adds a unique dimension to the bargaining context. The concern with avoiding concessions in any given set of negotiations that might have repercussive effects on other bargaining situations and even beyond, on non-bargaining-unit employees, appears to dominate the employer's bargaining position almost to the point of obsession. In the circumstances the unions have limited opportunities to make breakthroughs:[28]

> ...[whereas] in the private sector, naked union power, opportunism or economic conditions, *inter alia*, may produce wage rates that differ substantially from one industrial establishment or area to another, in the public sector the employer nowadays is called upon somehow to "justify" differentials in rates for employees as between one area and another and as between one classification or level and another.
>
> Similarly, fringe benefits . . . extended to one group of public employees in any jurisdiction can scarcely be denied to others in that jurisdiction.

Preparation for Negotiations

As signatory to eighty-one collective agreements[29] subject to renegotiation at regular intervals, some even on an annual basis, Treasury Board is normally in a constant state of bargaining, or preparation for bargaining, as are many of the bargaining agents. In the first round of negotiations, many of the agreements were, in effect, bargained together, between senior Treasury Board and bargaining-agent officials as this was virtually the only way to get the system off the ground. As one veteran union official remarked, "Never was so much negotiated for so many by so few — and with so little trouble." With the exception of the postal negotiations, where it was clear from the outset that a strike was virtually inevitable, observers agree that the first round of bargaining was carried out in a general state of euphoria since it was to the political advantage of the government employer and also to that of the union leaders to show that the system could work. The fact that some of the senior government officials involved in the negotiations had, at an earlier stage in their careers, been active in the staff associations was an additional factor promoting a climate of goodwill at the bargaining table.

The first negotiations resulted in substantial wage increases, particularly in the lower wage categories, to bring them into line with their private sector counterparts, an objective on which both parties were in substantial agreement. However, most of the other clauses in the first collective agreements amounted, in effect, to a codification of practices and conditions already in existence.

Following the first round of negotiations, collective bargaining has been carried out, in the vast majority of instances, on an individual bargaining-unit basis,[30] with an existing collective agreement as the starting point. Even when a newly certified bargaining agent replaces an incumbent, as we shall see below, it 'inherits' an existing collective agreement that becomes its starting point for negotiations. The operative word, once this bilateral system of labour relations was underway, became 're-negotiation'. The fact that forty-five collective agreements involving the Treasury Board terminated in 1982 illustrates the magnitude of this ongoing process, especially when one considers that at the beginning of 1982 there was a carry-over of negotiations from the previous year concerning twelve bargaining units. At times the volume has been highly concentrated. Thus, in the last three months of 1980 and the first month of 1981, negotiations were in progress for forty-four units. Fifty-nine collective agreements affecting 173 894 employees were signed in 1981.

Both parties, that is, the employer represented by Treasury Board and the bargaining agents who bargain with the Board, have, over the years and in the light of their experience under the system, evolved formal mechanisms — 'ritual mechanisms' as they have been called by some sceptics — for developing their bargaining positions, obtaining a bargaining mandate, and establishing bargaining teams. Both parties begin serious preparations for negotiations approximately six months before the termination of a collective agreement. The preparation stage ends for the bargaining agent with the submission of its demands; at that point the bargaining agent is ready to negotiate. For the employer, preparation for bargaining ends somewhat later. Treasury Board must consider the demands submitted by the bargaining agent. Furthermore, in view of the service-wide nature of occupational bargaining units, it must consult with the operating departments that use the services of the employees concerned before responding to the bargaining agent's demands. Separate employers, who bargain directly with their own employees, subject to Treasury Board guide-lines, do not have to operate under this complicating factor on the employer side.

Preparation by the Treasury Board as Employer

Advance Preparation

Advance preparation on the employer side involves gathering information from a number of sources. These include studies by research economists, compensation analysts and classification experts on the staff of Treasury Board itself; comparative wage surveys prepared by, or commissioned through, the Pay Research Bureau;[31] and consultation between Treasury Board and various departments of government about the experience under the existing collective agreement and suggestions for improvement. In view of the wide area over which an occupational bargaining unit is dispersed and the large number of 'user departments' generally involved, it is not always, or indeed often, readily apparent to the staff-relations officers of Treasury Board how the collective agreement has been working in practice, what difficulties may have come to light in its application, what pitfalls should be avoided in the renegotiated agreement, and what improvements might be considered. Accordingly information must be gathered, with the co-operation of the departments, on the difficulties that have been encountered in the application of the agreement in force. The employer must determine whether these difficulties have arisen from the inclusion of particular clauses or the wording of those clauses, whether or not a pattern of grievances has emerged and, if so, in what areas, and what the decisions of adjudicators have been concerning the grievances. In addition the employer must give consideration to any decision of the PSSRB that may be relevant or to court decisions, if there have been any, relating to the collective agreement in question or to any other collective agreement since such decisions may suggest the need for rewording, revision or elimination of a particular clause.

All the user departments are required, well in advance of negotiations, to comment on their experience under the agreement in force and to make written proposals for change. Once the union's demands have been received, these departments are approached again to consider those demands in order to advise Treasury Board which of them they can or cannot 'live with'. Treasury Board officials contend that this two-stage consultation process represents a significant improvement over earlier practice, when departmental input was solicited, more often than not, only after receipt of the union's demands.

There are considerable differences in practice in the extent of departmental response to requests for input into the preparation for negotiations, as well as in the calibre of the representatives the departments send to the bargaining table. The importance of a particular occupational group to a department's operation, the department's own importance, relative to other departments, as a user of bargaining-unit employees, and the perception it has of the potential influence on Treasury Board of any suggestions it may offer, as well as the mechanisms it has, or has not, established for communicating with its own local and regional offices from which information must be obtained, all combine to affect the extent of departmental participation in the preparation process. Finally, it should be noted that in spite of the formal procedures for involving departments in the preparation for negotiations, the departmental input that finds its way into the eventual bargaining mandate, as well as the participation of departmental representatives at the bargaining table, are limited, by and large, to items with an operational impact. For obvious reasons the items with direct monetary implications are decided at the Treasury Board level.

Data are collected on the following items so that Treasury Board can cost the union demands: average earnings for the bargaining unit, average pay rates for the bargaining unit, current hiring rates, years of service by five-year count, rate of sick leave and special leave usage and abnormal consumption patterns, vacation-entitlement averages, vacation-usage patterns, overtime-earnings average and patterns. Other information gathered to develop the original mandate and to back up the employer's position at the bargaining table will include, at a minimum, the latest pay and benefit data from the Pay Research Bureau (PRB); data from outside the PRB, where relevant to particular occupational groups; pay data for other bargaining units in the federal public service or even in some provincial services, which the unions may choose to use as a point of comparison; recent arbitral awards and conciliation-board reports so that the Board may observe whatever pattern these may set. During the preparation stage of negotiations, studies are also made of projected government programs and the reduction or abolition of others that might impinge on the particular bargaining unit involved, as well as of the rate of turnover in the bargaining unit under existing programs and the availability of replacement labour from within and from outside the public service. The recruitment/retention problem will necessarily have a bearing on the employer's bargaining position, and it is a matter on which the operating departments, in particular, place considerable, and understandable, importance.[32]

Development of the mandate request. Once the background material has been gathered, the union demands have been received, and consultation with the departments has been completed, the Staff Relations Branch of Treasury Board, which is responsible for the negotiating function, must develop a formal mandate request for approval by the political authority.

By the second round of bargaining, the employer had established a procedure, which has remained in effect ever since, whereby the individual responsible for negotiating an agreement plays the primary role in developing the mandate request. The negotiator considers the union's demands in the light of the comparative data available and in the context of overall government policy and of recent and current developments in related bargaining situations. He analyses the union's demands and determines what increases in pay and benefits seem justified; he assesses the revised wording required to overcome past administrative difficulties and decides on other adjustments that will accommodate new or changed government programs and meet the needs expressed by the operating departments responsible for administering the agreement. He must also bear in mind the strength of the bargaining agent, the history of its relationship with the employer, and the dispute-resolution specification. The negotiator is then in a position to put together a mandate request and bargaining strategy for consideration by his superiors in the Treasury Board hierarchy and for ultimate approval by the political authority. A senior Treasury Board official noted that a particular advantage in involving the negotiator in the preparation of the mandate request has been to keep that request realistic, for the negotiator has a personal interest in developing a mandate that will be acceptable, both to the authorities that must approve it and to the bargaining agent with which he hopes to achieve a settlement.

The mandate request, to be acceptable to the authorities, must take into account the government's pay and benefit policy which, as noted above, is based on the principles of comparability with the average rate paid for similar jobs outside the public service and the maintenance of historic relationships within the public service, where outside comparisons are lacking. Where the pay data show that a group has fallen significantly behind another with which it has been traditionally compared, particularly in the external market, the comparability principle will call for a larger-than-average increase, not only for reasons of equity, but because of the recruitment and retention problems involved. The negotiator realizes, when he is preparing his mandate request, that an out-of-line monetary increase or even an innovative normative clause will stand little chance of approval by his superiors unless it can be shown that it is so well justified by particular circumstances and so indisputably perceived as such by other bargaining groups that its repercussive effect can be minimized. When an unacceptable imbalance has developed for a particular group, Treasury Board guide-lines provide for the adjustment to be made in stages over a three-year period, if possible. This minimizes the effect that a larger-than-average percentage increase, however well justified by particular circumstances, might have on the aspirations and claims of the other groups; it also minimizes the cost to the government employer of implementing the increase by spreading it over a period of time.

While the mandate request, to be acceptable to the government employer, must respect that employer's basic compensation policy, it must also be realistic in terms of what the bargaining agent will, or even can, accept. Practical considerations sometimes dictate departures from stated policy, even in the development of a mandate request, as they frequently do in the course of negotiations when the 'crunch' is finally reached. For example, even if the pay data show that no increase is justified for a particular group on the basis of the comparability policy, it may be unrealistic to believe that a voluntary settlement could be achieved on this basis, or even that an arbitral award would be made without including any monetary improvement. The reality of such a situation would inevitably be taken into account by the negotiator formulating the mandate request and by the political authority that must ultimately approve it.

The negotiator develops the mandate request in consultation with his group chief; there are three of these in the Staff Relations Branch, each with a team of four or five negotiators under his supervision. The group chief, more likely than not, will be involved in the development of several mandate requests simultaneously; while a particular mandate request is being developed, one or more of his other bargaining units may be in negotiation or have just completed negotiations in this never-ending process. Each group chief, accordingly, will have a practical and personal interest in minimizing the repercussive effect of developments or potential developments in any bargaining situation on the other bargaining units for which he is responsible. More often than not, the group chiefs will discuss with one another the mandate requests in which they are currently involved before advancing them for consideration to the next step in the Treasury Board hierarchy, that is, to the Director of Industrial Relations, to whom they all report. Since the position was created in 1978, the Director has had overall responsibility for the eighty-one units with which the Treasury Board negotiates, as well as for keeping a general overview of the separate employers and their mandates.[33] The mandate request, pretty thoroughly 'vetted' by this time, continues up the Treasury Board hierarchy. The next step is to the Assistant Secretary of Staff Relations and Compensation, who will report on the request to the Secretary of Treasury Board. The mandate request then goes to the political authority, the President of Treasury Board, who, usually in consultation with his Cabinet colleagues, will make the ultimate political decision.

Although the 'ritual' for processing a mandate request is identical in all situations in which the Treasury Board is the employer, there are significant differences in the attention some mandates may receive at the upper levels of the Treasury Board hierarchy and at the political level. It would appear that a significant proportion — some say 80 per cent or more — of the mandate requests are approved almost automatically at the upper echelons of the hierarchy since whatever modifications are necessary to keep in line with government policy and to minimize repercussive effects on other bargaining units have been made in the earlier stages of the process. "The routine cases are handled routinely," a senior Treasury Board official has said. The exceptional cases take time both at the senior levels of the Treasury Board hierarchy and at the political level. Senior officials of the Staff Relations Branch will spend considerable time reviewing a mandate request and may even brief the Minister directly, identify the precedent-setting demands, and justify their recommendations concerning those demands. Examples of such situations occur where the comparable pay data seem to justify a larger-than-average percentage increase for a particular group; where some precedent-setting demands are an important element of a bargaining agent's strategy — "We'll strike if we don't get COLA, maternity benefits, shorter hours of work, . . ." — or where a particularly difficult or strike-prone group is involved, and critical problems are anticipated.

Once a mandate request has been approved, with or without modifications, at the ministerial level, it is returned to the negotiator. He and the members of his bargaining team are then technically free to conclude an agreement within the terms of the approved request, without further authority from their superiors, although in practice the negotiator is more likely than not to remain in regular communication with those superiors. Sometimes the bargaining strategy may be an integral part of the mandate: "Don't move on X until Y has occurred." This will depend to a considerable extent on the negotiator's experience; the more experienced the negotiator, the fewer instructions he is likely to be given about bargaining strategy; in other words, the more discretion he will be permitted to exercise in evolving a bargaining strategy of his own. But should a revision in the mandate itself be required, the negotiator must seek formal approval in a process not unlike the handling of the original mandate request. What happens to the mandate at the bargaining table, whether it is considered a mandate at all, and other aspects of the bargaining process will be discussed in the section on negotiating procedures.

Establishment of bargaining teams. Before the employer can proceed to the bargaining table, he must have established a bargaining team which, in addition to the Treasury Board negotiator, who is always the chairman, will include representation from the major user departments of the occupational group for which an agreement is being negotiated. The size of the bargaining team will depend to a considerable extent on the size of the bargaining unit and the number of departments involved. If a unit should cut across all departments in the public service, or even a significant number of those departments, it would clearly not be feasible for them all to be represented on the bargaining team. The practice that has evolved in such instances is to give representation to the high-user departments and to those with peculiar operational problems. A reasonable mix of small and large departments will be represented so that differences in the operational implications of union demands between small and large departments will be taken into account in the employer's negotiating position. In view of the need to deal with technical questions and of departmental concern with such questions, some departments now realize the importance of naming representatives to the bargaining team who themselves have had the benefit of some line experience and/or experience in implementing the technical aspects of the collective agreement, an area in which it is fair to assume that the Treasury Board negotiators will be lacking. (Treasury Board encourages the departments in this practice.) This is particularly so with respect to matters with operational implications, for example, overtime, shift work and part-time employment.

What is desirable in theory, however, is not always translated into practice. The calibre of the departmental representatives, their experience in collective bargaining, and their experience in the line operations of the department at the centre or at the various regional levels vary from department to department. The nature of the departmental representation reflects to a considerable degree the importance the department attaches to a particular set of negotiations: that is, the relevance of a particular occupational group to the total operation of the department and the perception of the influence that its representative might exercise in a given bargaining situation or has, in fact, been able to exercise in previous rounds of negotiations. It also depends, of course, on the calibre and experience of the persons available to serve as representatives, given the turnover in departmental personnel from one bargaining round to another. It depends, as well, on the extent to which the negotiations are likely to be prolonged and the department's problems in allocating personnel to ongoing tasks that must continue to be performed when an individual is released from his regular job to sit in on seemingly endless negotiating sessions.

Preparation by the Separate Employers

Development and Processing of the Mandate Request

In preparing for bargaining, negotiators for the separate employers, like the Treasury Board negotiators, consider the experience under the existing collective agreements and study developments in pay and benefits for comparable groups both in the federal public service and in the external market. However, although they are expected to conform to Treasury Board guide-lines and must eventually have their mandates approved by the political authority, the separate employers are not required to submit their mandate requests for approval before going to the bargaining table. It is not uncommon for a separate employer to wait until the area of agreement has become apparent in negotiations before raising a mandate request. As one spokesman for a separate employer explained the process: "We really bargain on two fronts. The employees have their expectations, Treasury Board its constraints. We look in both directions in developing our mandate request."

Once the mandate request is raised, the general procedure is to suspend negotiations until it has been officially approved: "The unions understand the break in negotiations. They know we have to negotiate with Treasury Board." Occasionally, however, a separate employer will make an offer to the bargaining agent, based on its mandate request, before receiving official approval. In one instance a separate employer actually signed a collective agreement before submitting a mandate request. Treasury Board was then asked, in effect, to ratify a *fait accompli*. Although the separate employer concerned was permitted to honour the agreement it had signed, the reaction provoked by this departure from the rules may be taken as virtual proof that it will not be repeated.

More often than not, a separate employer will consult with the Treasury Board Secretariat as part of the process of developing a mandate request which, in the final analysis, must be compatible with the government's pay and benefit policy to win approval by the political authority. Accordingly there are seldom significant deviations either in the mandate requests or in the eventual settlements that apply to groups such as clerks, stenographers and technicians, for which a good job match can be found in other parts of the federal service. The separate employers appear to enjoy some flexibility relating to rates of pay for groups without counterparts in the rest of the service, but little flexibility relating to benefits since these might set a pattern for other groups. There are occasional deviations from the general guide-lines on the basis of demonstrated need either in situations where wages have lagged for one reason or another and some catch-up seems indicated, or in situations where recruitment and retention of specialized personnel are a problem. Heads of agencies classified as separate employers have not hesitated to go the political route, frequently through the Minister to whom they report, to secure approval of a mandate request that goes beyond the general policy guidelines.

There is a routine procedure for processing the mandate request of a separate employer, as there is when Treasury Board is the employer. The request is raised with the Staff Relations Branch of Treasury Board or, more specifically, with its liaison officer responsible for dealing with the separate employers. It is considered by pay analysts and other experts in the Staff Relations Branch and then submitted, sometimes with modifications, to the President of the Treasury Board, who will be advised of the original request as well as informed about the modified version. Similarly the separate employer will be advised of the recommendations being made to the President of the Treasury Board by the Staff Relations Branch.

As happens when Treasury Board is the employer, "the routine cases are handled routinely at the top." As a general rule the recommendations of the Staff Relations Branch are accepted almost automatically at the ministerial level. Special cases, however, receive special attention. Where a mandate request deviates significantly from Treasury Board guide-lines, the case may require a Cabinet decision before the President of the Treasury Board takes action either to approve the mandate request or to return it with modifications. Examples are guide-lines on pay or other benefits either where a particularly specialized group is concerned and outside comparisons are lacking or where a group is on the conciliation/strike route or where pressure is being exerted by the Minister responsible for a separate employer.

In addition to the differences in developing and processing the mandate request, we find significant differences with respect to bargaining teams between the separate employers and those parts of the public service in which Treasury Board is the employer. The problem of establishing a representative bargaining team for bargaining units that cut across departmental lines, as is usually the case when Treasury Board is the employer, does not arise when the separate employers are involved. Although the separate employers use some professional negotiators hired for the purpose or loaned by a department, as is the practice with the Communications Security Establishment, whose chief negotiator comes from the Department of National Defence, the bargaining teams are comprised primarily of people involved in day-to-day contact with the employees to whom the agreement will apply. The director of industrial relations and several operational personnel will always be on the bargaining team. The employer bargaining team, as well as the union bargaining team, is therefore closer to the situation about which the teams are negotiating than is the case where the Treasury Board is the employer. Unlike the Treasury Board negotiators, most of the members of the separate employer's bargaining team have to administer the agreement they negotiate.

The PSCRA has introduced a limitation on the authority of a separate employer to deal with its employees. Changes in the compensation plan or other terms and conditions of employment contained in a collective agreement or arbitral award that is extended under that Act may be made only by or with the authority of the Treasury Board, even when binding on a separate employer.

Preparation by the Bargaining Agents

Advance Preparation and Consultation

The bargaining agents, like the employer, take the existing collective agreement as a starting point in their preparation for negotiations. Through studies by their headquarters' staffs and consultation with their membership, they, too, consider how the agreement has been working in practice, the difficulties that have been encountered in its interpretation and application, the grievances that have arisen and been taken to adjudication, the pattern of adjudication awards and other PSSRB decisions, as well as judgments by the courts if these are relevant. Like the employer, the bargaining agent considers the problems that might be avoided by changes in the new agreement's wording and in its other characteristics, but, of course, from a different point of view.

As far as wages and other benefits are concerned, the bargaining agent, like the employer, will consider what has happened to the comparative position of the bargaining unit relative to the outside market and to the achievements of other bargaining units in the public service since the existing agreement came into effect. The bargaining agent's demands, however, will reflect its desire to improve, rather than maintain, its so-called 'comparative position'; the basis of that position has always been a source of disagreement with the employer. While the unions accept the principle that public sector wages should be fair in comparison with wages paid outside the public service, they have traditionally differed strongly with the employer on what constitutes fair comparison. They have disagreed in particular with the employer's contention that compensation should be comparable to the average wage paid outside the public service, rather than to standards set by the better, or even the best, employers.

Accordingly the bargaining agents differ with the employer on the universe that should be used for pay comparisons. This is hardly surprising, for the results would be significantly different if a 100 per cent universe of outside employers were used, or if a survey sample were restricted to unionized employers or to enterprises over a certain size, or if other parts of the non-profit sector — provincial government employment, for example — were, or were not, included. The results would also be different if comparisons were based on the total group surveyed or, as the unions would prefer, on a certain proportion of that group, such as the top 60 or 75 per cent.

Finally, the bargaining agents also differ on the level at which individual job comparisons should be made within a survey sample, if, indeed, they can even agree — and frequently they cannot — on the appropriateness of the job match itself. Should these individual comparisons be made at the mean, the median, or one of the upper quartiles in the range of wage rates for the comparable occupational group within the survey sample? Some union spokesmen have also suggested that the principle of determining wage rates on the basis of outside comparisons would be more acceptable and could be more easily 'sold' to the membership if the bargaining agent itself were permitted to become more closely involved, along with the staff of the Pay Research Bureau, in the process of determining the job matches: "If I could only say, 'I went with the PRB guy myself and saw the fellow in the job they are comparing with yours — and he really does what you do', my members would accept the job matches. With agreement on the job matches, I could settle money in a day."[34]

In preparing for negotiations, the bargaining agents, like the employer, will use data provided by the Pay Research Bureau, particularly when it supports their position, as well as comparative data gathered from other sources; nevertheless, the basic philosophical differences between the parties will be reflected in the use they make of the data and how they interpret its significance. One union negotiator expressed these differences succinctly: "I look at the PRB data because I want to know about general trends. But that's it. I won't negotiate from mean rates."

In addition to looking at wages paid for comparable jobs, new and improved clauses in other collective agreements, pattern-setting arbitral awards, or conciliation-board reports, bargaining agents, in preparing for negotiations, place considerable emphasis on the collection and analysis of macro-economic data: that is, economic developments since the existing agreement was signed and forecasts for the period that the renegotiated agreement will be in effect. These data are used to support claims of erosion of real income through inflation under the old agreement and to back up demands for the protection of wage gains that might otherwise be lost during the term of the agreement under negotiation.

All bargaining agents have developed formal mechanisms for consulting their membership during the preparation of contract demands by means of a series of stages through which membership input is filtered and modified. The final determination of the package of demands to be served on the employer is made at union headquarters, where other relevant information will also be taken into account. The bargaining agent must strike a balance between pleasing the membership and keeping its demands sufficiently realistic to be taken seriously by the employer.

Many of the bargaining agents canvass the membership directly from central headquarters, asking for suggestions for change to the agreement, together with a statement of the reasons or problems that prompted the suggestions and the arguments that might be used at the bargaining table to support them. Sometimes the responses are returned directly to the central office to be analysed by the headquarters' staff. In the case of PAFSO, for example, where more than two thirds of the membership is outside Canada in widely scattered locations, no other method would be feasible. In other instances the membership input is screened by a regional committee before it is passed on to union headquarters, where a committee, which includes regional representatives as well as headquarters' officers and staff, makes the decision on the final demand package and on the priority of each of the items in that package to guide the negotiators in their strategy. While most of the bargaining agents solicit membership input by mail, a few, such as the postal unions, provide for face-to-face contact at the membership level as part of the mechanism for formulating their negotiating position. The constitutions of both major postal unions require contract seminars before each new round of negotiations; in addition the two unions provide for mailed-in suggestions according to the same general pattern as the other bargaining agents.

The influence of the occupational groups in PIPS and of PSAC's components on the formulation of contract demands reflects the peculiarities of those two bargaining agents' organizational structure as compared with that of the other bargaining agents in the public service. As already noted, PIPS is composed of relatively autonomous occupational groups that have been organized to conform in composition to the certified bargaining units for which PIPS is the bargaining agent. Accordingly the occupational groups, each representing a different professional group with particular characteristics and needs, play a major role in evolving and, in due course, negotiating the demands made by PIPS on their behalf. The demands are drafted by PIPS headquarters' staff on the basis of replies to a mailed membership survey, in addition to other information collected in full consultation with the executive of the occupational group concerned. A provision for regional representation on the occupational group executive, in turn, ensures significant regional input into the formulation of contract demands. Regional representatives on the executive of the occupational group supplement the information collected by the mailed questionnaire with input collected informally from members in the regions they represent. The final demand package must receive formal approval by the group executive before it is served on the employer.

The components of PSAC, each of which has members in a number of bargaining units, play an important role in handling membership input at the earliest stage and in formulating the final demands. As the Alliance represents a significant majority of employees in the public service and a far larger number of bargaining units than the other bargaining agents, its procedures for handling membership input and formulating final demands warrant particular attention. There are several stages in the process.

Six months before the expiration date of a collective agreement, an 'input call' for bargaining proposals from the members is forwarded to all components with membership in the bargaining unit. The components then proceed to collect proposals from standing bargaining committees at the local level whose function it is to review membership experience under PSAC agreements. Each component is responsible for developing a consensus or a majority position on the demands submitted to it by the locals. This becomes the component's official position which, in turn, is submitted to the Collective Bargaining Branch of the Alliance, where a demand package will be prepared for consideration by the National Bargaining Committee. This Committee, incidentally, includes representatives of all components that have submitted demands (that is, that have members in the bargaining unit), in addition to members of the Executive Management Committee of PSAC[35] and its representatives. After the National Bargaining Committee has determined the demands to be submitted to the employer, including any additional proposals it may decide to make, the Executive Management Committee may exercise a final veto on any aspect of the mandate that it considers might be detrimental to the majority of its membership or to other bargaining units that PSAC represents. In view of the large number of bargaining units it represents, several of which are usually in negotiation simultaneously, the Alliance, like the employer, must take some account of the total picture in preparing its bargaining position in relation to any particular group.

Bargaining Teams and Their Mandates

The mechanism for the formation of bargaining teams differs among bargaining agents, as do the mechanisms for consultation, but the aim in virtually all instances is to ensure the widest possible representation. In some cases regional representatives to the bargaining committee are elected; in others they are selected by the headquarters' staff or officers, either from the names submitted by the regional offices or even on a relatively arbitrary basis. PAFSO is an exception in that regional representation of the membership would clearly be impossible; while members on the bargaining team are all stationed in the Ottawa area, an effort is made to ensure fair representation from the three departments, External Affairs, Industry, Trade and Commerce, and Employment and Immigration, among which the membership of PAFSO is distributed. Although there is no constitutional requirement for regional representation on PIPS bargaining teams, the principle of such representation has become well entrenched in practice. Regional representation on the bargaining teams reflects the regional representation on the executives of the occupational groups, which, in turn, elect their representatives to the bargaining teams. PSAC, on the other hand, has neither formal nor informal mechanisms for regional representation, either on the bargaining committee described above, which determines bargaining policy, or on the smaller team of negotiators who go to the bargaining table. The negotiating committee is generally made up of a staff negotiator from PSAC headquarters, who acts as the principal spokesman, one person elected from the bargaining committee,[36] and a representative from any component with membership in the bargaining unit that expresses an interest in participating.

Like PSAC, other bargaining agents make a distinction between a fairly large bargaining or steering committee, which is responsible for establishing overall bargaining policy and formulating final contract demands, and a much smaller negotiating team that takes the demands to the bargaining table and handles the subsequent negotiations, using as a guide the priorities established by the larger committee. However, in contrast to Treasury Board negotiators, who must go to their superiors for any change in their mandate, union negotiators have been relatively free to use their judgment in a crunch; for example, within the general limits of the mandate they have been given, the union negotiators may drop one item in favour of another, at their own discretion, in the interest of securing settlement. The fact that agreements reached at the bargaining table are usually subject to membership ratification may itself constitute a built-in constraint on union negotiators to keep concessions within acceptable limits.

However, the largest bargaining agent in the public service has removed virtually all the flexibility previously enjoyed by its negotiating teams and still enjoyed by the negotiating teams of most other bargaining agents. An amendment to the PSAC Regulations went into effect on 28 February 1980, requiring a negotiating team to get approval from the bargaining committee from which it received its mandate before making even the slightest changes downward. The amendment, which implemented a decision of the 1979 Alliance Convention, reads as follows:

> Prior to altering the priorities or amending the mandate established by the National Bargaining Committee, members of the National Bargaining Committee will be consulted by the use of conference calls or other means.

There is more than a little concern within PSAC that its negotiators' hands will be tied, and that they may 'miss' a settlement while awaiting instructions, a criticism that the bargaining agents have often made about Treasury Board negotiators. One long-term negotiator commented rather bitterly: "There was never complete freedom, but now there is none. With no manœuverability, why not just mail the proposals to Treasury Board?" Time will tell the effect of the change. But the Convention is the governing body of the Alliance. The executive must therefore implement the Convention's recommendations. Meanwhile one bargaining agent at least — and the largest one at that — may be forced to abandon the popular accusation that the government negotiators lack a mandate. People in glass houses. . . .

Formal Initiation of the Bargaining Process

When a new bargaining agent that has not displaced an incumbent is certified, subsection 36(1) of the PSSRA sets a condition precedent to the giving of notice to bargain. The condition stipulates that the bargaining agent must first specify the process applicable to the bargaining unit for the resolution of any dispute. The process may be referral of the dispute either to arbitration or to a conciliation board.[37] By sections 37 and 38 of the Act, the process so specified remains in effect during succeeding rounds of bargaining until the process is altered in a manner provided for under the Act. After the specification of process has been made and recorded by the PSSRB, subsection 49(1) provides that either the bargaining agent for the bargaining unit or the employer may give notice to the other in writing, requiring it to commence bargaining with a view to the conclusion of a collective agreement.[38] When a bargaining agent has been newly certified in the circumstances set out above, the notice may be given at any time, provided, of course, that the dispute-resolution process has been specified.

Where, as now most often happens, a bargaining agent has had a previous agreement or has been bound by an arbitral award and wishes to alter its specification of dispute-resolution process, it must do so before notice to bargain is given. A notice in these circumstances is for the conclusion, renewal or revision of a collective agreement, and it may be given within the two months before the agreement or award in force ceases to operate or at any time after the agreement or award ceases to operate.[39]

A newly certified bargaining agent that displaces an incumbent must also specify which dispute-resolution process is applicable to the bargaining unit before notice to bargain can be given; once it has specified that process, it must then engage in bargaining upon notice given either by itself or by the employer.

It cannot rely on the specification made by its predecessor or on the bargaining that has taken place between the predecessor and the employer or on earlier steps taken to resolve any dispute between them. As far as the law is concerned, it must 'start from scratch'.[40]

According to paragraph 40(1)(*c*) of the PSSRA, where a newly certified bargaining agent has replaced an incumbent and, at the time of the new certification, a collective agreement or arbitral award binding on the employees in the bargaining unit is in force, the newly certified bargaining agent is substituted as a party to the agreement or award in place of its predecessor. However, notwithstanding any provision governing the duration of such an agreement or award, the newly certified bargaining agent may terminate the agreement or award on two months' notice to the employer, given within one month from the date of the certification. If the newly certified bargaining agent gives notice within the one-month period, it is entitled to give the employer notice requiring the employer to commence bargaining. No similar right is conferred on the employer. If the bargaining agent fails to give notice within the stated period, it is bound to continue under the existing agreement or award until the regular termination date. However, as we noted in Chapter 3, above,[41] in view of the provisions of the PSCRA, it is of little, or indeed no, value for a newly certified bargaining agent to give notice of termination in the circumstances outlined. On the other hand, where a bargaining agent is certified for a unit of employees for which no bargaining agent has previously been certified, a different principle would seem to apply. In the Miscellaneous Estimates Committee, in answer to a question addressed to Mr. Robert Cousineau, counsel for the Treasury Board, Mr. Cousineau said:[42]

> We have been concerned with initial certification of a bargaining unit, and the legislation as it is does not prevent a first contract being negotiated. What the latest legislation does is . . . look . . . at existing compensation plans and restrict . . . wage rates to certain percentages mentioned in the legislation. As far as the right of association is concerned, nothing that I can see in the bill affects that particular right.

It would therefore appear that in the circumstances just discussed, the bargaining agent could give to the employer notice to commence bargaining under subsection 49(2) of the PSSRA, and the employer's obligation to engage in bargaining remains intact. However, since a compensation plan would be in effect for the employees concerned, and all compensation plans are now governed by the PSCRA, the parties would be forbidden to bargain on wage increases that exceed the limits fixed by that Act.

Once notice to bargain has been given, the parties are required by section 50 of the PSSRA to meet and commence to bargain collectively in good faith and to make every reasonable effort to conclude a collective agreement. They must do so without delay, but at least within twenty days after notice to bargain is given or within such further time as the parties may agree. Where notice to bargain has been given, section 51 of the Act declares that any term or condition of employment applicable to the employees in the bargaining unit concerned that may be embodied in a collective agreement and that was in force on the day the notice was given remains in force until the dispute-resolution process for that bargaining unit has been completed,[43] except as otherwise provided by any agreement on that point that may be entered into by the parties.[44] Although there is no express provision in the Act that spells out the manner in which a 'complaint' about failure to observe section 51 may be brought to the attention of the PSSRB, the procedure in such a situation is now an application under section 18 of the Act, which will be discussed in Chapter 13, below.

The 'Good Faith' Requirement

So far there have been only three cases in which the PSSRB or its Chairman expressed a view about the *nature* of the obligation to bargain in good faith. In the *Postal Operations Case*[45] of 1979, the employer sought an order from the Board, directing the Canadian Union of Postal Workers to comply with the 'good faith' requirement. At the first official negotiating session following the giving of notice to commence bargaining, the bargaining agent sought to secure undertakings from the employer that it would comply with certain demands put forward by the bargaining agent as a condition of the latter's continued participation in negotiations for a new collective agreement. When the employer refused to give such undertakings, the bargaining agent withdrew from negotiations and refused to continue to bargain. The Board held that the bargaining agent was not justified in its refusal to bargain or in its withdrawal from the negotiations. However, it denied the employer the remedy it sought on the ground that the application was premature, since it had been made only six days after a single brief meeting following the serving of notice to bargain. In an earlier *Postal Operations Case*[46] in 1972, the Chairman of the PSSRB was called on to deal with an objection by the employer to the establishment of a conciliation board on the ground that the bargaining agent had not made every reasonable effort to conclude a collective agreement. The Chairman stated that the obligation to bargain in good faith did not require every change of position on one side to be met with a change of position on the other.

The most comprehensive discussion regarding good faith bargaining is to be found in the *General Labour and Trades Case*[47] where the PSSRB stated that since the language of the pertinent provision of the PSSRA was almost identical with a similar provision in the Ontario Labour Relations Act,[48] it appeared appropriate for the PSSRB to consider the Ontario Labour Relations Board's decisions on the matter as a guide. The guide-lines that the PSSRB inferred from the Ontario decisions were as follows:[49]

> a) The employer has the duty to recognize the union as the bargaining agent of its employees.
> b) Both the employer and the bargaining agent have the duty to share the intent of entering into a collective agreement, even though the objectives of the parties as to the content of the collective agreement might be different.
> c) The employer has the obligation to provide sufficient information in order to ensure "rational, informed discussion". . . .
> d) The negotiation process should be looked upon as a whole.

The third of these guide-lines was of particular concern to the PSSRB, and in elaborating on it, the PSSRB quoted the following statements from decisions of the Ontario Labour Relations Board:

> ...bargaining is in essence an exercise in *decision-making*.
>
> ...The decision-making capability of the parties depends upon . . . a full and open discussion of the items which are in dispute. . . .[50]
>
> While an employer must obviously choose a point beyond which it will not go in its wage offer it may not simply stonily assert its final position. It must be prepared to explain the rationale for its decision so that the employees' association can make an informed decision as to its own position in response. A union's decision to invoke a strike or sustain a lockout must not be made in the dark if

> unnecessary strikes and lockouts, with their attendant economic and social dislocation, are to be avoided.[51]

However, the PSSRB uttered a caution concerning the extent to which the views of the Ontario Labour Relations Board apply under the PSSRA. It said: "It goes without saying that in arriving at its conclusion the Board must take into account . . . the different context of collective bargaining in the Public Service of Canada." But it did not explain what that different context might be.[52]

In the few proceedings involving a question of duty to bargain during the term of a collective agreement, the PSSRB held that the duty applies only during the period of negotiations for the making of an agreement and ends once the agreement has been entered into. In the *Manning et al. Case*[53], for example, the Board said:

> The *statutory obligation* resting on the parties under . . . the [PSSRA] to bargain collectively in good faith and make every reasonable effort to conclude a collective agreement is one that operates during the period of bargaining for the making of an agreement. Once a collective agreement has been entered into, the statutory obligation of the parties is to abide by the terms of the agreement. Apart from the obligation to commence bargaining for the renewal of the agreement where proper notice is given . . . , there is no statutory obligation to bargain during the lifetime of an agreement that can be enforced by any proceeding before the Public Service Staff Relations Board. If the collective agreement itself calls for discussions or negotiations between the parties with respect to any matter, that is an obligation that can be enforced through the grievance process.

Similarly, in the *Dentistry Case*,[54] the PSSRB held that a notice of desire to amend a collective agreement during its term, on the basis of a reopener clause in the agreement (which provided that the agreement could be amended by mutual consent) did not trigger an obligation under the PSSRA to bargain in good faith and make every reasonable effort to conclude a collective agreement. However, the Board commented on the failure of the employer to respond to the notice given by the bargaining agent in accordance with the pertinent provisions of the collective agreement and on the failure of the bargaining agent to enforce compliance with the employer's obligation under the agreement to 'meet and discuss'.[55]

Although the PSSRA clearly enjoins the parties to bargain in good faith during contract negotiations, and although sections

63 and 77 of the Act make good faith bargaining a pre-condition for a reference to arbitration or a request for the establishment of a conciliation board, there is no provision, as there is in a number of other labour-relations statutes in Canada, spelling out specifically the manner in which a 'complaint' of failure to bargain in good faith may be brought to the attention of the Board.[56] The procedure that appears to have found favour with the parties is for an application to be made under section 18 of the Act, which will be discussed in Chapter 13, below.[57]

Although there is no statutory obligation under the PSSRA to bargain in good faith during the term of a collective agreement or arbitral award, nevertheless, the President of the Treasury Board said in his presentation to the Miscellaneous Estimates Committee concerning the situation that would arise if, on the basis of the PSCRA, a bargaining agent sought a change in terms and conditions of employment during the extended period for collective agreements and arbitral awards:

> ...The government has a commitment to act as a good employer opposite employees. . . . If a request is made by a union, then I would expect the government to sit down and negotiate in good faith with that union with a view to resolving the conflict or whatever the issue may be with respect to a non-monetary issue. That is what the government policy will be.
>
> ...I would give a guarantee that negotiations would be opened upon the request of the union affected. That depends clearly upon the nature of the request, just as I would not expect the union to say, well, we will accept every request from the government to sit down and re-open a non-monetary issue with a view to changing it or doing something that the union perceives as being unreasonable.[58]

The Bargaining Process

Assuming that the preparations for negotiations have been completed, that the legal prerequisites have been satisfied, and that the bargaining will be carried out in good faith, let us now look at the structure, dynamics and end result of the negotiating process itself, keeping in mind that we are dealing with the situation that existed before the enactment of the PSCRA.

Structure

As we have already noted in Chapter 3, above, the PSSRA provided for the certification of bargaining units on the basis of pre-determined occupational classifications. The result, with few exceptions, has been the certification of national bargaining units[59] cutting across departmental lines[60] and the negotiation of uniform terms and conditions for bargaining-unit employees, regardless of geographic location.[61] Collective agreements have been negotiated, by and large, on an individual bargaining-unit basis, according to the formal bargaining structure envisaged in the Act and implicit in the certificates of certification. However, there have been some departures from the usual negotiating structures. Where, for example, a bargaining agent represents supervisory and non-supervisory employees in the same occupational group, but in different bargaining units, the practice has been to negotiate their agreements together, regardless of the separate certifications. The result has been virtually identical agreements apart from a difference in pay. In some such agreements the supervisory pay differential is mentioned specifically; in others it is simply implied as the supervisory workers alone qualify for the upper range of the negotiated salary scale because of their superior grade levels in the classification system.

There have also been a few experiments with joint bargaining involving different occupational groups in the same occupational category, as distinct from joint bargaining by supervisory and non-supervisory bargaining units in the same occupational group. In addition there have been two instances in which the bargaining agent for units comprising the employees of more than one occupational group have made a joint reference to arbitration.[62] There have been no instances of *full-scale category bargaining* in the 'central administration', although category bargaining has been mentioned as a desirable objective,[63] and some tentative, but so far unsuccessful, initiatives have been undertaken in this direction.[64] In the case of the 'separate employers', on the other hand, where numbers are small, it is not unusual for a bargaining unit to be certified on a category basis. At the NFB, the SGCT has negotiated a single collective agreement for employees in the three occupational categories for which it is the certified bargaining agent. The occupational categories concerned, (that is, the administrative support, operational and technical categories) have separate certifications. This is the only instance to date of joint bargaining involving different occupational categories.

In the central administration, the greater number of experiments with joint bargaining by occupational units have been made by PIPS affiliates. The following professional units have, at one time or another, negotiated their agreements together: medical and dentistry; economics and mathematics; psychology, social work and physiotherapy; agriculture, forestry and biology. A few of these units negotiated together for several bargaining rounds, but all eventually broke up either because a weaker group believed that its interests were not receiving sufficient consideration or because a stronger group thought that it was being held back. The longest ongoing experience with joint bargaining by occupational units has been that of the technical inspection, scientific support and general technical units, represented by PSAC. These units, all in the technical category, have negotiated at a single bargaining table, with a single team on each side of the table, in four rounds of bargaining. Their fourth joint collective agreement was entered into 22 May 1981, with an expiry date of 21 December 1982.

While the attempts at joint bargaining of entire collective agreements by different occupational groups have been few and far between and have produced little long-term satisfaction for most of the groups concerned, the duplication of negotiating time and effort they were intended to eliminate remains an unresolved problem. Accordingly there have been many suggestions and some attempts to co-ordinate negotiations, where possible, at least with respect to items of common interest. Although, among collective agreements, there are some important differences reflecting different needs and aspirations of different occupational groups, as well as differences in their ability to achieve them, one of the most striking aspects of such agreements in the federal public service is the large number of items they have in common.[65] In the forty-one collective agreements between Treasury Board and PSAC, well over half the clauses are identical. The same is true for the agreements negotiated by PIPS. Some of the common clauses reflect common terms and conditions of employment inherited from the pre-bargaining era and incorporated in the first collective agreements. Others have come about through a 'ripple' or pattern-setting effect in subsequent rounds of negotiation, a phenomenon which, as noted above, is of considerable concern to the employer. A few of the common clauses have been negotiated jointly outside the statutory bargaining structures, some under recently adopted procedures in the NJC.[66] Others have been produced in the few instances of joint bargaining just noted. Most, however, have been negotiated separately, that is, on a unit-by-unit basis.

Union and Treasury Board officials are generally agreed that the duplication of time and effort spent in negotiating items of common interest should be eliminated or at least reduced. Discussions to this effect were going on both within the Alliance and PIPS and between them and Treasury Board before the enactment of the PSCRA. So far, however, there seems to have been more talk than action. The vested interests of some of the groups and the fear, particularly among the smaller ones, that their interests would not be protected[67] are serious impediments to the co-ordination of bargaining efforts and/or the formal consolidation of bargaining structures. In addition there would be problems in co-ordinating the termination dates of existing collective agreements and, even more difficult to resolve, there is the question of dispute resolution. Joint or co-ordinated bargaining on all, or even a limited number of, items would require, as a *sine qua non*, the same dispute-resolution option for all participating groups.[68] Where a number of groups are involved in joint negotiations, the question of ratification procedure must also be addressed. Should an agreement be ratified by a majority of the bargaining units concerned, by a majority of their total membership, or by a majority vote in all bargaining units affected? Finally, some union spokesmen are complaining that rigidities in the law itself discourage bargaining agents from seeking change in bargaining structures. In particular they note the delays inherent in the two-stage decertification and certification procedures now required under the PSSRA for the consolidation of bargaining units, and the fact that during the period involved, the membership concerned would be 'deprived' of bargaining rights. Accordingly PSAC wants the PSSRA amended to permit a bargaining agent to combine certifications without going through time-consuming decertification and certification procedures if it can convince the PSSRB that it has the authority of the members concerned. Such a permissive provision, it has been noted, might also facilitate the formation of councils of unions, where desired, by different bargaining agents and their members.[69]

Dynamics[70]

The first round of negotiations was handled in large measure by senior officials of Treasury Board and of the bargaining agents, in the absence of a cadre of staff negotiators on both sides. In subsequent rounds, however, the bargaining process has been entrusted, more often than not, to full-time staff negotiators. Senior Treasury Board and union officials clearly keep in touch with the progress of negotiations and are readily available for consultation; they also give advice on their own initiative when they think that circumstances warrant. It is only in exceptional cases, however, that they themselves come to the bargaining table. For senior officials on the employer side to do so on a regular basis would hardly be feasible in view of the multiplicity of bargaining situations to which Treasury Board is a party. The same is true for the larger bargaining agents which, like Treasury Board, are usually involved in several sets of negotiations at any given point in time. Where, on the other hand, a bargaining agent represents a single bargaining unit, whatever its size, senior union officials are more likely than not to be at the bargaining table and in charge of the negotiations. This has been true from the outset for high-profile groups like CUPW, LCUC and CATCA, and for PAFSO and IBEW, among others.

As a general rule politicians do not intervene directly in the bargaining process, although their indirect influence cannot be denied whether it is limited to setting policy guide-lines in advance of negotiations or takes the form of statements or actions that affect the bargaining climate before or during negotiations[71] or involves a decision to increase an offer or risk a strike when the 'crunch' has finally been reached. The few occasions on which a Cabinet Minister has actually come to the bargaining table have, however, been so highly visible that they have created a public impression of far greater political involvement in the negotiating process than actually exists. Until the clerical and regulatory strike in 1980, when the President of the Treasury Board, along with senior Treasury Board officials, took an active role in a late stage of the negotiations, direct ministerial intervention had been limited to dealings with CUPW, LCUC and CATCA.[72] The presence of the President of PSAC at the clerical and regulatory bargaining table was also a distinct exception to general practice.[73]

The Treasury Board negotiator, as chairman of the employer bargaining team, is generally the principal spokesman for management at the bargaining table, inviting input from departmental representatives at his discretion, but usually only when clauses with operational implications are being discussed. However, there are some notable exceptions to the general rule, particularly when a departmental representative is senior to the Treasury Board negotiator and/or more experienced in negotiations. One departmental spokesman accustomed to bargaining under mandate remarked: "It really isn't so different since the mandates were withdrawn. I'm senior, and the Treasury Board negotiator knows it. I tell him what to say — and what *not to say*! I say, 'When such-and-such comes up, *I'll* speak!' And I do!"

In some instances, particularly where specialized professional services are involved, as in a medical bargaining unit, the Treasury Board negotiator, though officially the principal management spokesman, may willingly take second place to representatives of the user departments who, because of their experience in dealing with the professional groups during the term of the collective agreement, know more about the pertinent professional issues and needs. Similarly, on the union side, the chairman of the negotiating team will defer to experts in a particular area when specialized issues are being discussed.

In the vast majority of instances, the bargaining is carried to completion by the primary negotiators, that is, those originally assigned to the bargaining table; but, again, there are exceptions. The most dramatic and highly visible of these exceptions, which, in fact, are extremely rare, are the political 'end runs' already mentioned. A lot of strings that are not apparent to the public may be pulled informally before, or even after, negotiations reach the political level. A few of the bargaining agents have made a practice of going up the Treasury Board hierarchy, even if not as far as the political level, particularly if the Treasury Board negotiator is new and inexperienced.[74] At times a union negotiator may even go to the Minister or a member of one of the opposition parties in Parliament.

Treasury Board spokesmen insist that such approaches are rare and may, in fact, slow down negotiations rather than facilitate them.

> We know the union leaders who try to undermine our negotiators. Treasury Board officials talk to one another too! Word gets around who is trying to second guess our negotiators. We're determined not to let it happen. It may have been different in the earlier years. But the unions have to get used to the idea now that Treasury Board negotiators have a mandate.

The question of the government negotiator's mandate and, even more important, the other side's perception of the negotiator and his mandate, is an important dimension of the bargaining process in the public sector. As long as there is any doubt about who is controlling negotiating policy, the accusation that Treasury Board negotiators are 'message boys' and that they lack a mandate to make a deal will continue to be made and used to justify 'end-run' tactics, political or otherwise. Sometimes the accusation will even be used for tactical reasons by a bargaining agent's negotiator who may himself, in fact, be stalling.

It has been suggested that the key question may actually be less *whether* the negotiator has a mandate (as he has: namely, to implement government salary policy in the context of his own negotiations) than *when* he receives his mandate; the monetary mandate is sometimes withheld until a relatively late stage in negotiations. When negotiations are protracted, there is also the question of whether the original mandate is relevant by the time the 'crunch' is reached, particularly in a period of rising inflation, and whether, in such situations, the negotiator can obtain approval for an upward revision of his mandate in time to effect a settlement. Developing a mandate is essentially a dynamic process. The fact that a negotiator may not have a firm mandate on monetary issues at the outset of negotiations does not mean that one will not eventually be forthcoming. The employer, as party to a multiplicity of negotiations, may delay approving a mandate while waiting for the outcome of a set of closely related negotiations or for a conciliation board's report or for an arbitral award that may be expected to set a pattern. There may also be some tendency to hold back on the monetary mandate when a negotiator is inexperienced: "He might give the shop away if we let him know how far he can go too soon." Sometimes, as noted earlier, the negotiating strategy may be written into the mandate: "Don't give anything on the monetary items until the normative issues have been settled." In such instances the notion that a monetary mandate is lacking, or that one will not eventually come, may be false. An experienced union negotiator expressed understanding of the delays in the procedure, but remarked that his bargaining team might become restive: "Sometimes I bring them to the bargaining table just to show them I'm doing my job."

A former Treasury Board negotiator, speaking particularly of the early years under the collective bargaining regime, said he found it "positively embarrassing" to come to the bargaining table while waiting for a monetary mandate. But other negotiators say they need time to 'feel out the situation', and that a mandate is best developed in the course of negotiations. A union leader with long bargaining experience noted significant improvement in recent years with respect to the mandate of the government negotiators, but commented, "Sometimes it's the negotiator holding back. He may be a hard-liner himself. He may have a personal ambition to settle below the guide-lines. This creates the impression that he has no mandate. It isn't necessarily true." Frequently the problem may not be the lack of a mandate as much as lack of experience on the part of the negotiators. Spokesmen for both parties tell of settlements that were lost when a negotiator, on one side or the other, 'missed the signals'.

As in the private sector, much depends on the perception the negotiators have of one another and the relationships they may have established in previous rounds of bargaining. The bargaining dynamics will obviously be affected if a relationship of respect is lacking, or if a negotiator believes that his counterpart has no mandate to settle or is lacking in experience or ability. Both sides also express a degree of uneasiness when facing a new negotiator.

It would appear that Treasury Board negotiators generally manage to settle within their original mandates which, according to Board officials, are approved in all but exceptional circumstances in plenty of time for the 'crunch'. Spokesmen for Treasury Board say that requests for upward revision of a mandate occur in fewer than 10 per cent of negotiations, but are handled expeditiously when made. Some observers maintain, however, that the momentum for a settlement is easily lost while the negotiator is awaiting instructions.[75] The access of the negotiator to the decision makers and the confidence the latter have in the former's judgment may well be significant factors in the process of mandate revision. These factors, in turn, may be related to previous experience and performance. The less experienced a negotiator is, the more difficulty he is likely to have persuading his superiors to revise his original mandate. As a veteran conciliator noted, "Some of the negotiators have to go to conciliation to have their mandates revised. They *use* the conciliator to persuade their superiors to revise the mandate."

Sometimes an upward revision of a mandate becomes virtually inevitable because of erosion in the value of the original mandate in the course of the bargaining process. The figures on which the mandate was based may become outdated as a result of other settlements, changes in the overall economic situation, and so on.[76] Similarly the bargaining agent's demands may be eroded by delays. Speaking of his own experience, a union negotiator said in one instance that over time the cost of living went up, other collective agreements were signed, and the data on which the demands had originally been made became outdated. "We would have jumped at a lower offer six months earlier," he maintained.

It is generally agreed that delays can exacerbate poor relationships and may, in fact, be used by union leaders to stir up membership militancy. However, most bargaining agents admit that their members rarely suffer monetary loss as a result of protracted negotiations. "We often get bigger increases as the cost of living goes up. And they're always retroactive. A lump sum looks good to the members."[77] Some delays are virtually built into the system; one such is the requirement on the employer side for consultation with the departments, as well as the time-consuming 'designation' procedure for groups on the conciliation/strike route.[78] Other delays may be the result of deliberate foot dragging by one side or the other or both while they wait for the results of other negotiations in progress. This is hardly surprising in view of the multiplicity of bargaining situations to which the same employer — and sometimes the same bargaining agent — is a party.

Some delays are simply part of the collective bargaining 'ritual' as it has developed in the private sector: unrealistically high initial demands, unrealistically low counterproposals. Such a delay simply creates a period for feeling out the intentions of the other party and is generally understood and accepted for what it is by both sides. Occasionally, however, ritual bargaining has been counter-productive for the employer, particularly in situations where antagonisms have been escalating for a variety of reasons. Commenting on the clerical and regulatory strike, a union official said:

> They had their nerve to offer us 5 per cent right after the CUPW settlement — even if they intended to raise it eventually. And to make matters worse, they announced at the same time that inflation had hit 9 per cent. It was just too provocative. Nobody's going to rub our noses in the mud. We said to our members, "Look how they're treating you."

It goes almost without saying that the negotiating process and its results will be different for different occupational groups and, as experience has shown, even for the same occupational group at different points in time.[79] Among the many factors affecting the bargaining relationship, one of the most important is the extent of confidence and communication between the parties outside the period of formal negotiations. There have been a few cases in which Treasury Board is the employer, and some among the separate employers as well, in which an ongoing consultative relationship between the parties has become so highly developed that most, if not all, differences, apart from those about money, have been resolved by the time formal negotiations for renewal of the agreement have begun.[80] A departmental official dealing with a medical group remarked on the limited role for the official negotiators in some cases: "I told the Treasury Board negotiator what had been settled in consultation, much of it more important than money to these people. He then got his mandate on that basis. We had an agreement in a matter of hours." At the opposite extreme are the postal unions, where it is generally agreed that 'real negotiations' only begin after a conciliation board has been appointed. Most of the other bargaining relationships fall somewhere in between.

The collective agreements to be analysed in Chapter 7, below, are an interesting reflection of these relationships: the units with the most highly developed consultative relationships during the contract period have the 'thinnest' collective agreements, while the postal unions have the 'thickest'. It has been suggested, in fact, that the size of a collective agreement is inversely related to the trust between the parties.[81] Where little or no trust exists, every eventuality is spelled out. Where there is a high level of trust, much can be taken on faith.[82] An employer representative noted, however, that this trust must be carefully cultivated, for it could backfire if abused.

Finally, it has been suggested that the bargaining process will be affected in some measure, at least, by the choice of impasse procedure, not only because of the attitudes the choice reflects, including the bargaining agent's perception of its clout and its willingness to use it, but also because of the built-in dynamics of the impasse procedures themselves. A study of bargaining experience between 1968 and 1975, in units of 500 or more members for which Treasury Board is the employer,[83] found a marked trend away from negotiated settlements under the arbitration route, as well as a greater tendency to go to impasse in subsequent rounds once a group had already done so.[84] It also found that the percentage of total settlements reached in the intermediate stages of conciliation and mediation was significantly higher in each round of bargaining for the groups where a strike might be at the end of the road than for those that had opted for arbitration. However, as we shall see,[85] proportionately more agreements are settled without recourse to arbitration, under the arbitration-route procedure than are settled without resort to a conciliation board, under the other procedure.

End Result of the Process of Bargaining

The end result of the process of bargaining described in the earlier sections of this chapter may be a collective agreement, a reference to arbitration or a request for the establishment of a conciliation board, depending on the circumstances. If, during the process of bargaining, the parties reach agreement on all the terms and conditions of employment and related matters that are to govern their relationship for the ensuing period, the agreement is incorporated in a written document[86] which is executed[87] by the representatives of the respective parties. The PSSRA, in section 58, provides that once an agreement is entered into, it is "binding on the employer, on the bargaining agent that is a party thereto and its constituent elements, and on the employees in the bargaining unit in respect of which the bargaining agent has been certified".

Section 63 of the PSSRA provides that where the bargaining agent has specified reference to arbitration as the appropriate dispute-resolution process, the parties may enter into a collective agreement on those provisions on which they have been able to agree and may, within seven days of entering into the agreement, refer to arbitration the arbitrable matters that remain in dispute. Subsection 72(1) provides that an arbitral award is binding on the parties and on the employees in the bargaining unit. Where the parties have resolved some matters before the reference to arbitration and have entered into a collective agreement on those matters, the arbitral award coupled with the terms of the collective agreement will constitute the terms by which the parties and the employees in the bargaining unit will be bound.[88] However, subsection 72(1) makes no mention of the constituent elements of the bargaining agent as the Act does concerning the binding effect of a collective agreement. As will appear below,[89] some bargaining agents do not enter into a pre-reference agreement, but with few exceptions[90] they do enter into a collective agreement incorporating the terms of the award after the award has been made.[91]

Where the applicable dispute-resolution process consists of reference to a conciliation board, the parties frequently reach agreement, and the agreement is reduced to writing and executed accordingly. Where the parties have been unable to arrive at a settlement through their own efforts, and a conciliation board has been established, the parties, with only two exceptions, have been able to reach agreement either as a result of the board's mediation or through negotiations that followed the conciliation board's report. As for the two exceptional instances, in one the terms and conditions were determined by legislation;[92] in the other a process was set up by legislation that led to a final determination.[93]

In Chapter 3 we outlined the procedure through which representatives of Treasury Board are authorized to enter into a collective agreement for a bargaining unit of employees other than the employees of a separate employer. We have also pointed out that the separate employers negotiate and sign their own agreements, subject to Cabinet approval.[94] As far as the bargaining agents are concerned, authority to enter into a collective agreement is governed by their respective constitutions. The vast majority of constitutions require that after a tentative agreement has been entered into by the bargaining team, a ratification vote is to be held.[95] In a few instances the constitutions empower an executive body to lay down policies for the taking of a ratification vote. The constitution of the Association of Postal Officials of Canada, for instance, provides that the "Association shall be solely and exclusively responsible for . . . the establishment of policies on matters related to . . . ratification of agreements." In practice the Association has always submitted a tentative agreement to a ratification vote. Again, under PSAC's constitution, its National Board of Directors is charged with responsibility for the establishment of policies on matters related to collective bargaining, including the ratification of agreements. Regulation 15, enacted by the Board of Directors, provides that:

1. A ratification vote shall be taken for the acceptance or rejection of a Memorandum of Settlement by the members in the bargaining unit(s) concerned.
2. The Executive Vice-President in charge of Collective Bargaining, on authority delegated by the Executive Management Committee, shall sign a collective agreement for a bargaining unit when a majority of the votes cast are in the affirmative.

PIPS' constitution empowers its Board of Directors to appoint representatives or agents to act on its behalf in matters pertaining to collective bargaining. The representatives or agents may be empowered to enter into agreements on PIPS' behalf, subject to ratification by the Board after the Group Executive has so recommended with the support of the Collective Negotiations Panel, a committee that co-ordinates PIPS' negotiations and consultation activities. In the event of a disagreement between the Group Executive and the Board, the Board may hold a referendum. In addition any group may require that ratification of an agreement be authorized by its membership before executive approval is given.

Neither the constitution of the International Brotherhood of Electrical Workers (IBEW) nor the by-laws of its Local 2228, the bargaining agent for the electronic technicians' bargaining unit, require ratification of a settlement by the members, but it is the invariable practice for a ratification vote to be taken among the members in the bargaining unit. Similarly, although PAFSO's constitution does not call for ratification of a collective agreement by its members, a ratification vote is, in fact, conducted. The same is true for the *Syndicat général du cinéma et de la télévision*.

As we pointed out earlier,[96] if it were alleged by anyone that the bargaining agent has not observed its constitution or by-laws, the remedy of a dissatisfied member does not lie under the PSSRA, but perhaps in another forum at common law. However, in the *Aircraft Operations Case No. 2*, the PSSRB expressed the opinion[97] that adequate provision should be made for the ratification by the membership of any settlement arrived at by the bargaining committee.[98]

The Public Sector Compensation Restraint Act: Collective Bargaining 'On Hold'

The PSCRA has extended, for a period ranging from two to three years, all collective agreements and arbitral awards in the public service that contain a compensation plan.[99] Since all the collective agreements and arbitral awards do contain a compensation plan, it follows that collective bargaining in accordance with the process described in this chapter is in a state of suspension for the period during which the PSCRA is applicable to any particular bargaining unit. The stated policy of the government, as indicated by the Honourable Donald J. Johnston, then President of the Treasury Board, on second reading of Bill C-124 in the House of Commons is that "at the end of the program the normal process of collective bargaining can and will be resumed."[100]

The Professional Institute of the Public Service filed a formal complaint with the International Labour Organization (ILO) on behalf of eleven certified bargaining agents representing employees in the federal public service, alleging that the enactment of the PSCRA violated provisions of a number of Conventions of the ILO in that the legislation provided "for the removal of collective bargaining rights in the Public Service of Canada". Complaints were also filed by the PSAC and by several trade union federations. The complaints were referred to the Committee on Freedom of Organization of the ILO. The Committee came to the conclusion that Canada had not violated the several Conventions involved. It expressed "the hope that the Government will keep the situation under constant review and negotiate and consult with the unions concerned with a view to ensuring any adverse effects of the legislation are overcome." The Governing Body of the ILO accepted the recommendations of the Committee, but noted that the complainants could refile their complaints at any time. The complainants are now preparing to do this since, in their view, the Committee had not had an adequate opportunity to examine all aspects of the situation.

Notes

1. See Chapter 3, note 69, above.
2. These statistics are based on the situation that preceded the coming into force of the Canada Post Corporation Act on 16 October 1981. At that time four of the certified bargaining agents (Canadian Union of Postal Workers, Letter Carriers' Union of Canada, Association of Postal Officials of Canada, and Canadian Postmasters and Assistants Association) ceased to play a role in

the federal public service. Since their entire membership has been transferred out of the public service, they are no longer governed by the PSSRA. Employees of the Post Office Department who had been classified in occupational bargaining units for which other bargaining agents were certified have also been transferred to the Canada Post Corporation. See also Table 8, below.

3. See above, Chapter 2, p. 26.

4. This is not unique to Canada. Postal workers and air-traffic controllers have been traditionally militant in the United States and in other countries, whether or not those countries afford the legal right to strike or even to bargain collectively. The groups just named wield great power by virtue of their monopoly services and the public inconvenience they can cause by withdrawing them.

5. PSAC components are: Agriculture Union, Canada Employment and Immigration Union, Customs and Excise Union, Department of Veterans' Affairs Component, Environment Component, National Health and Welfare Union, Northwest Territories Public Service Association, Public Works Component of the PSAC, Supply and Services Union, Taxation Component, Union of Canadian Transport Employees, Union of Energy, Mines and Resources Employees, Union of National Defence Employees, Union of Postal-Communications Employees, Union of Public Service Commission and Language Training Programmes of the Department of National Defence Employees, Union of Solicitor General Employees and a National Component; the last-named group is composed of members employed in departments and agencies of which none is large enough to form a separate component on its own.

6. *Hospital Services Case No. 1* (1967) PSSR Reports K 6. See above, Chapter 3, p. 76.

7. See note 6, above.

8. As we noted in Chapter 1, above, the PSSRA requires the bargaining agent to make a pre-bargaining choice between two dispute-resolution processes: binding arbitration or the appointment of a conciliation board, with the ultimate right to strike. For a detailed discussion of the dispute-resolution alternatives and their implications, see Chapter 10, below.

9. Although on several occasions LCUC, like CUPW, had used its legal right to strike, it had been co-operating with the Post Office in an experimental project called 'Intergroup' that was designed to improve everyday working relationships. Moreover LCUC had been an active member of the NJC, in which CUPW had consistently refused to participate.

10. The first lawful strikes in which CUPW was involved (1968 and 1970) were carried out in concert with LCUC; at that time the two groups were bargaining as a Council of Postal Unions. CUPW has since conducted two lawful strikes on its own (1975 and 1978). For a discussion of other 'work interruptions' in the Post Office, see below, Chapter 12, pp. 636–41. CUPW also brought a disproportionate number of grievances to adjudication (that is, well in excess of 50 per cent of all grievances referred), but it must be noted that its refusal, on principle, to consolidate grievances has grossly inflated these statistics. It was not unusual for CUPW to file hundreds of individual grievances in a single day, all on an identical issue.

11. See Table 8, footnote 3, below.

12. The organizational structure of PIPS takes account of five geographic regions, each with its own Regional Council. In addition there is the National Capital Region, where approximately 49 per cent of PIPS' members are located. PIPS' by-laws require regional representation on the National Board of Directors, the governing body between conventions, as do those of PSAC. In contrast with the Alliance, but like most of the other bargaining agents, PIPS provides for regional input into the preparation of demands and the composition of bargaining teams. It accomplishes this primarily through the occupational groups as we shall see in a later section of this chapter.

13. The presidency of the Association rotates among these departments. The incumbent, of necessity, is stationed in Canada during his or her term in office.

14. See Chapter 10 p. 483 ff., below. For information on the affiliation of bargaining agents, see Table 8, footnote 3, below.

15. Among the few exclusive employers of employees in an occupational bargaining unit are the Department of National Defence, which employs the two ship-repair units and the defence scientific service unit; the Department of the Solicitor General (Penitentiary Service), which employs the correctional guards; the Department of Transport, which employs the air-traffic-control, aircraft-operations, radio-operations and lightkeepers units; the Department of the Environment, which employs the meteorologists; and the Post Office, which employs the units represented by CUPW, LCUC, the Association of Postal Officials of Canada, and the Canadian Postmasters and Assistants Association.

16. A settlement with the Letter Carriers was reached with the intervention of the Postmaster General in the Conservative government on the eve of a general election. Following the election, in which the Conservatives were defeated and the

Liberal party was returned to office, a newly appointed Postmaster General involved himself in negotiations with CUPW. Both settlements gave the union COLA clauses, contrary to Treasury Board policy. See below, Chapter 7, p. 335 and note 41 in that chapter.

17. The scope of bargaining, though narrower than in the private sector, is broader than in the federal public sector in the United States, where even wages are non-negotiable.

18. Richard M. Bird, with Meyer W. Bucovetsky and David K. Foot, *The Growth of Public Employment in Canada*, Vol. 3 of Series on Public Sector Employment in Canada (Montreal: The Institute for Research on Public Policy, 1979), p. 117. For a discussion of revenue elasticity at different levels of government and the importance of wages as a share of total expenditure, see Douglas A.L. Auld, *Wage Behaviour and Wage Control in the Public Service*, Discussion Paper No. 137, Centre for the Study of Inflation and Productivity (Ottawa: Economic Council of Canada, 1979), p. 20.

19. For a comparison of the pressures on the parties in the private sector and in sectors representing varying degrees of public interest, see Paul Phillips, "Theoretical Problems of Public Interest Sector Industrial Relations", 31 *Relations Industrielles/Industrial Relations* (1976): 566–87.

20. See Chapter 8, below.

21. See paragraph 68(*b*) of the PSSRA. The government relies heavily for this purpose on private sector comparability surveys conducted by the Pay Research Bureau. See Chapter 13, p. 681 ff., below.

22. The different views of the parties on the appropriate criteria for establishing salaries for air-traffic controllers has been evident in all their negotiations, but came to a head in the most recent round of bargaining. The parties agreed, in February 1981, almost on the eve of a strike deadline, to postpone further bargaining for a six-month period during which the Hay Group, an independent consulting agency experienced in job evaluation, undertook a study to evaluate the job content of air-traffic control and its comparative worth. CATCA agreed to co-operate with the study, which was financed by the government. The Hay Report was submitted in September 1981 and was considered by the parties in the course of bargaining for the renewal of their agreement.

23. Nicole Gendreau (Director, Evaluation, Analysis and Data Services Division, Treasury Board Secretariat), "Compensation in the Federal Public Service", an unpublished address to the Advisory Council, Compensation Research Centre, The Conference Board in Canada, June 1978.

24. See below, Chapter 10, pp. 442–44.

25. "Agenda for Co-operation: A Discussion Paper on Decontrol and Post-Control Issues" (Ottawa: Government of Canada, 1977), p. 60.

We are concerned here with the principle of comparability with the private sector, not with the formula for determining how the comparison is to be achieved. As the study paper went on to say (pp. 60–61):

> One problem is how total compensation and comparability are to be determined. Obviously, analytical methods must be devised which are objective and fair and perceived to be so by employees, their unions and employers. Factors include methods of job matching, relativities within and between similar groups, individual performance, special conditions of work which may require premium pay, and the geographic aspect of labour markets.

26. See below, Chapter 10, pp. 443–44. For provisions in these Bills, with implications for managerial exclusions, including statutory limitations on bargaining-unit salaries, see above, Chapter 2, pp. 43–45.

27. The same is true for government employers in the provinces.

28. J. Finkelman, "The Scope of Bargaining in Canadian Public Service Labor Relations Legislation", Address to the International Symposium on Public Employment Labor Relations, New York, 3 May 1971. See Chapter 10, pp. 458–60, below, for a discussion of the so-called 'parasitic quality' of arbitral awards as a function of the same phenomenon.

29. This was the situation as of 1 September 1981. The number has since been decreased by four by reason of the coming into force of the Canada Post Corporation Act.

30. See, however, recent developments regarding the National Joint Council discussed in Chapter 5, above, p. 222 ff.

31. For a discussion of the role of the Pay Research Bureau, see Chapter 13, p. 681 ff. below.

32. Concern with the recruitment/retention problem has been reflected in official statements on compensation policy since 1919 (see p. 258, above), as well as in paragraph 68(*a*) of the PSSRA, which requires arbitral awards to take account of "the needs of the Public Service for qualified employees". The same concern has been reflected in paragraph 13(*a*) of the PSCRA, which empowers the Governor in Council, on the recommendation of the Treasury Board, to substitute for the 5 per cent allowable increase in the second year of its application a different percentage "where he considers it to be in the public interest to do so on grounds of labour shortages".

33. The Staff Relations Branch of Treasury Board is only concerned with the separate employers who are involved in collective bargaining. Separate employers who do not bargain collectively are required to consult with the General Personnel Management Division of Treasury Board before introducing changes in rates of pay and other benefits. The Personnel Management Division is concerned primarily with pay and benefits for employees excluded from collective bargaining.

34. For the extent of participation by the bargaining agents in the process, see Chapter 13, pp. 682–83, below.

35. The Executive Management Committee is composed of five elected officers, the National President and four Executive Vice-Presidents, as well as a full-time Executive Secretary and Comptroller, both of whom are appointed.

36. The provision that a member of the bargaining committee, who must also be a member of the bargaining unit, be a member of the negotiating committee — and paid by the Alliance — was adopted at the 1979 PSAC convention.

37. See Chapter 10, p. 425 ff., below.

38. During the initial certification period, that is, the 'phasing-in' period immediately after the PSSRA came into force, a timetable was established by Schedule B, which fixed the earliest date on which notice to bargain could be given for units of employees in each of the occupational categories, as well as the earliest date on which a collective agreement could be entered into or an arbitral award rendered. The dates for the giving of notice ranged from 28 February 1967 to 31 January 1968, and the dates for agreements or arbitral awards ranged from 31 March 1967 to 31 March 1968. See subsec. 26(6).

39. Paragraphs 49(2)(*b*) and 49(2)(*a*).

The Canada Labour Code provides (R.S.C. 1970, c. L–1, subsec. 147 [1], as amended by S.C. 1972, c. 18, s. 1) that notice for the renewal of a collective agreement may be given "within the period of three months immediately preceding the date of expiration of the term of the collective agreement, or within such longer period as may be provided for in the collective agreement". *Employer-Employee Relations in the Public Service of Canada* (Ottawa: Information Canada, 1974) (hereafter referred to as the *Finkelman Report*), Part I, pp. 130–31, "recommended that paragraph 49(2)(b) of the Public Service Staff Relations Act be amended to conform to the provisions of the Canada Labour Code. The giving of notice at an earlier date than is presently permitted should go some way to reduce the irritation that develops because of the hiatus that now often occurs between the expiry date of an agreement and the renewal thereof." There have been instances in which the parties, by mutual consent, have begun to bargain at an earlier date.

40. *Aircraft Operations Case* (1979) PSSRB file 192–2–19.

41. See above, Chapter 3, p. 123.

42. Proceedings of the Miscellaneous Estimates Committee, 19 July 1982, p. 88: 41.

43. That is, until an agreement is reached between the parties, or an arbitral award is issued, or seven days have elapsed after the report of a conciliation board has been received by the Chairman of the PSSRB, or the Chairman has denied a request for the establishment of a conciliation board, as the situation may be.

44. See further in this connection Chapter 12, p. 650, below.

45. (1979) PSSRB file 148–2–17.

46. Conciliation Board files 190–2–19; 190–2–20; 189–2–45; 189–2–47. At a hearing before the Chairman of the PSSRB, on objection by the employer to the establishment of conciliation boards, each of the parties conceded that the other had bargained in good faith. However, counsel for the employer contended that the Council of Postal Unions had not made every reasonable effort to conclude a collective agreement. The Chairman found, in effect, that the Council of Postal Unions had made every reasonable effort within the meaning of the PSSRA and determined that conciliation boards should be established without delay. It therefore became unnecessary for him to deal with the issue of whether the 'good faith' precondition to the establishment of a conciliation board in s. 77 must be construed in the light of the words associated with the phrase in section 50: "and make every reasonable effort to conclude a collective agreement."

47. (1977) PSSRB file 148–2–16.

48. R.S.O. 1980, c. 228, s. 15.

49. See note 47, above.

50. *Graphic Arts International Union Local 12-L* v. *Graphic Centre (Ontario) Inc.*, 76 CLLC ¶16,041.

51. *Ontario Nurses' Association* v. *Board of Health of Kawartha et al.* (1977) 1 C.L.R.B.R. 221 at 226. The Board also quoted from the following Ontario decisions: *United Electrical, Radio and Machine Workers of America (U.E.)* v. *DeVilbiss (Canada) Ltd.*, 76 CLLC ¶16,009 and *United Steelworkers of America, Local 13,704 v. Canadian Industries Limited*, 76 CLLC ¶16,014.

The policy by which the Ontario Labour Relations Board is guided is summarized by J. Sack and M. Levinson, *Ontario Labour Relations Board Practice* (Toronto: Butterworth, 1973), p. 228, as follows: "Bargaining in good faith has been defined as the willingness to discuss claims freely and fully and to justify them by reason where opposed. On the other hand, the law does not require that the parties reach agreement, only that they honestly attempt to do so."

52. In the *General Labour and Trades Case* (note 47, above), the bargaining agent had alleged that the employer had failed to comply with the provisions of s. 50 of the PSSRA in that it had refused to "'negotiate on the question of wages anything that [was] contrary to its interpretation of the guidelines of the Anti-Inflation Act'." The PSSRB found that there was a certain amount of discussion between the parties, during which the employer stated that according to studies it had made, there was no ground to request an exemption from the guide-lines. The bargaining agent did not attempt in any way to prove that such grounds did exist. In denying the relief sought by the bargaining agent, the Board said:

> The Board is of the opinion that, in order to ensure a 'rational, informed discussion', the parties must disclose to each other the grounds upon which they are relying on the issues in dispute. This the [employer] has done concerning the possibility of securing an exemption. It was surely incumbent upon the [bargaining agent] to prepare its own case for an exemption under the Anti-Inflation Guidelines and to confront the [employer] with its analysis. . . .

The Board had noted earlier that in this case, the bargaining agent, as applicant, bore the burden of proving its allegations.

53. (1969) PSSR Reports K 448 at K 449-K 450.

54. (1978) PSSRB file 148-2-14.

55. In an *obiter dictum*.

56. The obligation to bargain in good faith and make every reasonable effort to enter into a collective agreement is set out in s. 148 of the Canada Labour Code, R.S.C. 1970, c. L-1, as amended by S.C. 1972, c. 18, s. 1. Subsec. 187(1) of that Act provides for a complaint for failure to comply with s. 148.

For the situation in Ontario under the Labour Relations Act before 1975 and after the amendments introduced in that year, see Jeffrey Sack and Michael Mitchell, *Ontario Labour Relations Board Practice, Supplement 1977* (Toronto: Butterworth, 1977) p. 103 ff.

57. The remedies for failure to observe s. 50 will be discussed in Chapter 12, p. 649, below.

58. Proceedings of the Miscellaneous Estimates Committee, 27 July 1982, p. 96: 119.

59. For departures from this practice, see Chapter 3, pp. 114-15, above.

60. See note 15, above, for some exceptions.

61. See Chapter 8, pp. 382–84, below, and in the same chapter, notes 44–48, for a discussion of the exceptions to national wage rates.

62. *General Technical, Social Science Support and Technical Inspection Case* (1979) Arbitral Awards file 185–2–204; and *Administrative Services and Program Administration Case* (1981) Arbitral Awards file 185–2–244.

63. The principal advantages cited by proponents of category bargaining are economies of scale in negotiations and a reduction in the incidence of sequential strikes. Such strikes now appear to be a matter of considerable concern to the bargaining agents, as well as to the employer. Some union leaders anticipate increasing difficulty in persuading workers to honour picket lines of other bargaining units, particularly after a strike of their own. As one union spokesman observed: "When they get back to work after a strike, they want the pay to keep coming in. You can only push solidarity so far."

64. Recent initiatives by PSAC to establish category bargaining in the administrative support and administrative and foreign service categories broke down internally, largely because of the opposition of some of the smaller groups that feared their interests would be submerged.

65. See Chapter 7, below, for an analysis of contract clauses.

66. For the negotiation of bargainable items through the NJC and their incorporation in collective agreements, see Chapter 5, pp. 225–28, above.

67. There have been suggestions that sub-groups in existing bargaining units would be better off in units of their own. However, proponents of fragmentation of bargaining structures are in a distinct minority.

68. This could be a particular impediment to the establishment of category bargaining.

69. See the *Finkelman Report*, Part I, pp. 232–34, for recommendations regarding merger of existing bargaining units.

70. This section will focus primarily on negotiations to which Treasury Board is a party. There are fewer deviations from the private sector bargaining model among the separate employers.

71. The extent to which a Minister becomes involved, directly or indirectly, in a bargaining situation depends largely on personal inclination and/or government policy. However, some statements and/or action may be provoked by pressure from opposition members of Parliament. A reading of *Hansard* shows a frequently recurring question: "What is the Minister doing about XYZ negotiations?" This is political intervention, too.

72. The history of politicized negotiations relating to CUPW and CATCA in particular led a Treasury Board official to remark, "We have three classes of unions in the Service: CUPW, CATCA, and the rest."

73. Given the crucial nature of these negotiations, the President of PSAC, more likely than not, would eventually have come to the bargaining table. That he came so near the outset, however, was because of particular circumstances in the union. The PSAC staff negotiators, in dispute with the Alliance, were in a strike position themselves, and some rotating strikes had already begun. The President of the Alliance took over to ensure continuity in the negotiations.

74. There was a 50 per cent turnover of Treasury Board negotiators in the summer of 1980.

75. This has generally been less of a problem on the union side, as union negotiators, by and large, have been permitted greater discretion at the bargaining table. See pp. 276 – 77, above, for recent constitutional change in PSAC, which has removed this discretion from its negotiators.

76. Unions maintain, in addition, that the original mandates are based on outdated data. Noting some built-in delays in the data-collection process, a union negotiator said, "They came with PRB data for 1979 when we were negotiating in 1980."

77. A few union leaders have complained of unfavourable tax implications of these retroactive settlements, but this has seldom been an issue.

78. Before conciliation procedures can be invoked, agreement must be reached on a list of 'designated employees' to remain on the job in the event of a legal strike. See Chapter 10, p. 483, ff., below.

79. The militant behaviour of some previously docile groups shows how relationships can change.

80. Highly specialized professional groups such as doctors and dentists are cases in point. However, some interesting consultative relationships have also been established for non-professional groups, notably in the Department of National Defence. See Chapter 5, pp. 236 – 38, above.

81. A relatively short collective agreement may also reflect the peculiar characteristics and needs of a particular occupational group, as in the case of PAFSO, for whom ongoing consultation on certain matters is more appropriate than formal negotiations. See below, Chapter 7, pp. 307 – 08.

82. Some professionals, such as doctors, would actually feel constrained by a detailed collective agreement.

> I don't want a collective agreement that says how many professional conferences I can attend in a year. I'm better off leaving it open. Then I can go more or less as necessary. The department managers know we have to keep up to date. And I'm glad we don't get overtime. I'd be insulted. I'm not a '9–to–5' guy.

83. John C. Anderson and Thomas A. Kochan, "Impasse Procedures in the Canadian Federal Service: Effects on the Bargaining Process", 30 *Industrial and Labor Relations Review* 3 (April 1977), pp. 283–301.

84. As we noted in an earlier section, and as will be discussed in some detail in Chapter 10, below, a significant number of groups have changed their original dispute-resolution specification from arbitration to the conciliation board/strike route; some have done this after unfavourable arbitration awards. The Anderson-Kochan findings are based on groups that chose the arbitration option and *remained with it*, and these findings should be interpreted accordingly. For an analysis of the impact of arbitration on bargaining dynamics and a full review of the literature on the subject, see Bryan M. Downie, "The Behavioural, Economic and Institutional Effects of Compulsory Interest Arbitration", Paper prepared for the Centre for the Study of Inflation and Productivity (Ottawa: Economic Council of Canada, 1979).

85. See Chapter 10, pp. 456–58 and 473–74, below.

86. The term 'collective agreement' is defined in part (s. 2) as meaning "an agreement in writing".

87. Paragraph 57(1)(*b*) speaks of the agreement being executed.

88. See subsec. 71 (3).

89. See Chapter 10, p. 441, below.

90. After awards in the following units: scientific research (1972); biological sciences (1972 and 1975); mathematics (1973); forestry (1975); agriculture (1976); and engineering and land survey (1977).

91. Regarding any obligation to bargain after an agreement has been entered into or after an arbitral award has been made, see p. 281, above.

92. Air Traffic Control Services Continuation Act, S.C. 1976–1977, c. 57.

93. The Postal Services Continuation Act, S.C. 1978, c. 1, provided that the term of the collective agreement between the parties that had expired on 30 June 1977, was "extended to include the period beginning on July 1, 1977 and ending on December 31, 1979" (s. 5). The agreement was to be considered amended by incorporation of any amendments agreed to by the parties on the

basis of the mediation provided for under the Act and by any arbitral award made by the mediator-arbitrator (s. 7). For further discussion of this Act, see Chapter 10, pp. 452–53, below.

94. See above, pp. 268–71.

95. Canadian Postmasters and Assistants Association; Canadian Union of Postal Workers; Council of Graphic Arts Unions of the Public Service of Canada; Canadian Merchant Service Guild; Canadian Air Traffic Control Association; Economists', Sociologists' and Statisticians' Association; Federal Government Dockyards Trades and Labour Council (East); Letter Carriers Union of Canada; Research Council Employees Association; and Federal Government Dockyards Trades and Labour Council (Esquimalt).

96. See Chapter 3, pp. 123–24, above. See also Chapter 12, p. 635, below.

97. In an *obiter dictum*.

98. (1971) PSSR Reports K 657, at K 673.

99. See Chapter 9, p. 408, below.

100. *House of Commons Debates*, 15 July 1982, p. 19363. See also 30 July, p. 19873.

7: *Contract Clauses*

Statutory limitations on the scope of bargaining under the Public Service Staff Relations Act (PSSRA) have precluded the negotiation of certain contract clauses that are common, or even standard, in the private sector. The absence, for example, of some union and employment-security provisions, as well as seniority provisions relating to training, promotion, lay-off and recall, reflect these limitations and will be discussed below. However, in considering collective agreement clauses and their frequency in the federal public service compared with other sectors,[1] it is important to remember that the absence of some provisions because of statutory limitations or other causes, does not necessarily mean that the benefits they represent are lacking. This applies, for example, to pension benefits[2] and benefits under the Group Surgical and Medical Insurance Plan (GSMIP),[3] as well as to various other service-wide entitlements under Public Service Terms and Conditions of Employment Regulations. Some of these benefits, such as lay-off provisions, though 'non-negotiable' under the PSSRA, have been worked out in National Joint Council (NJC), as have numerous Treasury Board policy directives; these include, among others, directives on relocation allowances and isolation pay.

As we noted in Chapter 6, above, some employee groups have shown a preference for 'thin' agreements that leave much of the employment relationship to trust. Others have preferred to spell out every eventuality in formal contract language. For one bargaining unit, that of the foreign service officers, the majority of whom are employed outside Canada, more of the employment conditions overseas are covered by 'directives' than are covered by the actual collective agreement. Pointing to the variety of conditions of employment in overseas locations, some of which are unique to certain postings, a spokesman for the Professional Association of Foreign Service Officers (PAFSO) noted that many matters are more appropriately dealt with in ongoing consultation than in the formal negotiating period. "How can you argue over the cost of a meal in Kuala Lumpur when you are negotiating a collective agreement? No wonder the agreement is thin — and the Directives weigh a ton. We keep adding to them as the occasion requires." A clause in the PAFSO agreement, as well as in agreements covering other units some of whose members are employed outside Canada, declares that the Foreign Service Directives apply unless they are less favourable to the employees than those contained in the applicable agreements.

Many of the Foreign Service Directives, as well as a number of other items of service-wide interest, have been negotiated in the NJC.[4] While items negotiated in the NJC do not appear as contract clauses, they have the force of the collective agreement under the 'National Joint Council clause' cited in Chapter 5 and now found in almost all agreements in the federal public service.[5]

As we saw in earlier chapters, the Public Sector Compensation Restraint Act (PSCRA) suspends collective bargaining, for all practical purposes, for the period of its application and restricts the items that may be considered in the NJC. In addition the Act has the effect of rendering inoperative certain clauses in existing agreements. The following analysis of contract clauses will take account of the impact of the PSCRA on existing agreements.

Management and Union Rights

Employer's Rights and 'Prerogatives'

Most of the collective agreements have a management-rights clause on the pattern established in the private sector. This clause stands in addition to the management rights and 'prerogatives' specifically protected by section 7 of the PSSRA.[6] Collective agreements covering 90 per cent of employees in the federal public service contain a very general statement of residual management rights. The following clause, for example, appears in all agreements negotiated by the Public Service Alliance of Canada (PSAC): "Except to the extent provided herein, this Agreement in no way restricts the authority of those charged with managerial responsibilities in the Public Service." While most other bargaining agents, including the postal unions, have negotiated similar clauses with slight variations in wording, the postal agreements, in their provisions on technological change, have imposed restrictions on management rights that are without parallel in the rest of the public service. A provision of the Canadian Union of Postal Workers (CUPW) agreement, discussed below in this chapter, encroaches on management rights specifically protected by statute.

A handful of collective agreements enumerate a detailed list of management prerogatives in addition to making a general statement of residual rights. The following provision in the agreement of the Canadian Air Traffic Control Association (CATCA) is a case in point:

> The Association recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage and operate the Air Traffic Control Service in all respects, including, but not limited to the following:
>
> (a) to plan, direct and control operations, to determine the methods, processes, equipment and other matters concerning the Air Traffic Control Service, to determine the location of facilities and the extent to which these facilities or parts thereof shall operate;
>
> (b) to direct the working forces including the right to decide on the number of employees, to organize and assign work, to schedule shifts and maintain order and efficiency, to discipline employees including suspension and discharge, and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive rights and responsibilities of the Employer.

In a few instances the management-rights clause is supplemented by separate clauses scattered throughout the agreement that specify particular management 'prerogatives': for example, the right to assign shift work, to assign an employee to stand-by duty, to perform tasks away from the employer's premises. Usually, however, prerogatives of this nature are subsumed under the general provision for residual management rights.

Union Security and Rights

As in the private and provincial public sectors, all contracts in the federal public service have a union-recognition clause granting exclusive bargaining rights to a particular bargaining agent. The agreements usually include a corollary provision for the appointment of union representatives. However, union-security clauses, some of which are common in the private sector, are conspicuous by their absence in the federal public service. A requirement of union membership as a condition of employment would, by definition, be contrary to the 'merit principle' as a basis for appointment to the public service, as well as a violation of the law.[7] Nevertheless, while union-security clauses are lacking, the federal public service is ahead of both the private sector and the provincial public services in providing for check-off of monthly union dues. Virtually all the federal public service agreements provide for a check-off of such dues[8] subject, in all but a few cases, to a so-called 'conscience clause' that permits an employee to make a contribution equal to union dues to a charitable organization if he is "a member of a religious organization . . . whose doctrine prevents him as a matter of conscience from making financial contributions to an employee organization." The 'conscience clause' does not appear in the CATCA, Letter Carriers Union of Canada (LCUC) and CUPW agreements.

Almost all agreements in the federal public service have standard provisions for the conduct of union business, such as leave of absence for contract negotiations and other union work and for attendance at union congresses and executive meetings.[9] These provisions are generally qualified by the addendum, "where operational requirements permit", which protects the ultimate authority of the employer. While leaves of this nature are generally without pay, grievance work performed by union officials during working hours is fully compensated under practically all agreements; this arrangement is somewhat more generous than the arrangement in the provincial public services and considerably more so than the arrangement in the private sector.[10]

Most agreements provide for leave of absence, often with pay, for all employees, whether or not they are union representatives, who are called as witnesses before conciliation or arbitration boards, in grievance or adjudication hearings, or for "other activities under the Public Service Staff Relations Act", again subject to the overriding condition, "where operational requirements permit". Only a few agreements provide leave for employees elected or appointed to full-time union office and, of these, only the postal agreements provide specifically for the accumulation of seniority during the appointee's/electee's term of office.

General provisions for bulletin-board space for union notices, access of union representatives to the employer's premises for resolution of complaints and grievances, and the right of the bargaining agent to information about personnel matters such as appointment, promotion, transfer, suspension and termination of employees, creation of new jobs or establishment of new classifications within a bargaining unit, notice of employee lay-off or redundancy, are common in federal public service agreements. Other clauses directly related to union rights and security, which are found in some private and provincial public sector agreements, are totally lacking. Provisions protecting work-trade jurisdiction and the right to honour picket lines of other bargaining units and to refuse 'hot cargoes', for example, are lacking. A few agreements, however, reflect some concern with protecting bargaining-unit work.

A letter of understanding, attached to the CATCA agreement entered into in March 1979, provides limited protection as follows:

> Functions which are now performed by members of other bargaining groups will normally not be assigned to members of the Air Traffic Control group nor will functions which are presently only performed by members of the Air Traffic Control group be assigned to members of other bargaining groups.
>
> Where because of operational requirements either party deems it desirable to deviate from this understanding, the parties agree to enter into discussions to consider such proposals of either party and may mutually agree to make exceptions to the foregoing.
>
> It is also agreed that this letter will in no way prejudice the positions of either party, or interfere in any way with commitments already made, in relation to the performance by [Air Traffic Control] assistants of estimate copying, flight data posting and mission plotting.

The CUPW agreement protects bargaining-unit members from being forced to perform work outside their job descriptions and also prohibits employees in a managerial capacity from performing bargaining-unit functions. A new provision introduced into the 'External Affairs' clause of the electronics agreement entered into by Treasury Board and the International Brotherhood of Electrical Workers (IBEW) in August 1980 provides limited protection against the use of foreign technicians for bargaining-unit work. Like the CATCA accord, neither of these agreements guarantees full protection of work jurisdiction. However, the LCUC agreement declares that: "An employee in the bargaining unit will not be required to perform work in another bargaining unit. Similarly an employee from another bargaining unit will not perform work in the bargaining unit."

Union/Management Co-operation

Most agreements contain a commitment, in one form or another, to union/management co-operation.

Statement of Purpose

With the notable exception of the postal unions, bargaining agents in the federal public service have agreed to a 'Purpose of Agreement' clause setting out the benefits of harmonious relationships. The following, which appears as the first clause in all PSAC agreements, is typical:

> The purpose of this Agreement is to maintain harmonious and mutually beneficial relationships between the Employer, the employees and the Alliance, to set forth certain terms and conditions of employment relating to pay, hours of work, employee benefits and general working conditions affecting employees covered by this Agreement and to ensure that all reasonable measures are provided for the safety and occupational health of the employee.
>
> The parties to this Agreement share a desire to improve the quality of the Public Service of Canada and to promote the well-being and increased efficiency of its employees to the end that the people of Canada will be well and efficiently served. Accordingly, they are determined to establish, within the framework provided by law, an effective working relationship at all levels of the Public Service in which members of the bargaining unit are employed.

Similar statements of good intent are to be found in agreements negotiated by the Professional Institute of the Public Service (PIPS) and other bargaining agents, including CATCA. LCUC and CUPW, on the other hand, both limit their statement of purpose as follows:

> The purpose of this Collective Agreement . . . is to establish and maintain rates of pay, hours of work, other working conditions and conditions of employment, and to provide appropriate procedures for the resolution of grievances and problems during the term of the Agreement.

Consultation

Virtually all collective agreements in the federal public service recognize the value of consultation between the parties during the contract period. Some provide specifically for the establishment of labour/management committees to maintain ongoing consultation at the national level, and some at the regional and local levels as well.[11] Others are silent on the consultation mechanism. In most of the PIPS agreements, as well as in the agreements covering, among other groups, the Canadian Union of Professional and Technical Employees (CUPTE) affiliates and the Economists', Sociologists' and Statisticians' Association, the clause relating to consultation is very general and provides no specific consultative mechanisms. The following, from the commerce agreement, is typical of the provisions for joint consultation agreements negotiated by PIPS:

> The parties acknowledge the mutual benefits to be derived from joint consultation and will consult on matters of common interest.
>
> The subjects that may be determined as appropriate for joint consultation will be by mutual agreement by the parties and shall include consultation regarding career development and the provision of information to employees and the Institute. Consultation may be at the local, regional or headquarters level as determined by the parties.

Some agreements contain a much more elaborate provision. The agreement between Treasury Board and the IBEW, Local 2228, on behalf of the electronics technicians has, almost from the outset, contained a comprehensive consultation clause relating both to mechanisms for consultation and to the items on which consultation may take place. The list of items for consultation under the electronics agreement has been enlarged over the years and now includes housing; parking; training (that is, scheduling of study after normal working hours); duration of tour and return of employees posted for lengthy terms of field survey or construction trips; supervisory differential for aeradio-speciality-team supervisors; compensation for technicians performing courier duties; isolated posts, which specifies a trip 'out' for death in the family; and the scheduling of shift cycles. The IBEW agreement declares, in addition, that the employer will consult the union before implementing any changes in terms and conditions of employment not covered in its clauses and identifies among such terms and conditions those established by the following regulations or directives: Travel Directives, Foreign Service Directives, Isolated Post Regulations, employer's share of premium payments for the GSMIP and for provincial and supplementary hospital insurance. Regardless of the provisions for consultation in these and other agreements, consultation will have to be limited to items outside the purview of the PSCRA for the period that that Act remains in effect, as with the NJC consultations discussed in Chapter 5, above.

The PSAC agreements, unlike the electronics agreement, make no provision for consultative mechanisms, other than by placing an obligation on the employer to consult with a "representative of the Alliance". They also fail to specify the frequency with which consultation must take place. Most of the PSAC agreements, however, contain a longer list of items "appropriate for consultation" than does the electronics agreement, all of the items "without prejudice to the position the Employer or the Alliance may wish to take in future about the desirability of having the subjects dealt with by provisions of collective agreements. . . ." The following provision from the library-science agreement is typical of the "appropriate subjects of consultation" under Alliance collective agreements: pay administration; relocation directive; insurance for long-term disability; training and career development; cafeterias; mobile canteens; washrooms; rest-rooms; showers; locker facilities and recreational facilities; parking privileges; payment of school fees and costs of transportation to school for children of employees; provision of uniforms and protective clothing; provision to the Alliance of departmental manuals and Treasury Board directives; technological change and reduction of work-force, including measures to deal with their effect on employees; Treasury Board Living Accommodation Charges Directive; entertainment expenses; Travel Directives; Foreign Service Directives and the Single Assignment Policy; Isolated Post Regulations; employer's share of premium payments for GSMIP, provincial and supplementary hospital insurance.

In relation to the items specified as appropriate for consultation, the PSAC agreements provide that "new policies will not be introduced and existing regulations or directives will not be cancelled or amended by the Treasury Board in such a way as to affect employees covered by this Agreement until such time as the Alliance has been given a reasonable opportunity to consider and to consult on the Employer's proposals." A clause to this effect is also found in the nursing agreement which, unlike other agreements negotiated by PIPS, contains a detailed list of subjects for consultation, though it is somewhat shorter than the library-science agreement. Consultation on career development and nursing care " . . . at the local, regional or national level" is provided under a separate clause in the nursing agreement.

In some agreements the consultation provisions are tied to one or two specific problems: for example, consultation will occur in case of termination or transfer of operations;[12] the layout of work areas;[13] the utilization of free-lancers;[14] amendments to standards of discipline;[15] administrative details relative to implementation of provisions for assignment of overtime or the rescheduling of shifts;[16] vacation planning and schedules;[17] and career development.[18] A few contracts provide for consultation on productivity.[19] Some now contain a clause, such as the following from the CATCA agreement, providing that "wherever possible, the Employer shall consult with representatives of the Association at the appropriate level about contemplated changes in conditions of employment or working conditions not covered in this Agreement."[20]

Agreements for the electronics, air-traffic-control and postal units provide for consultation at the national, regional and local levels, in contrast to most other agreements under the PSSRA, which do not mention the level of consultation. Furthermore, while most of the other agreements, including the CUPW contract, are silent on mechanisms for consultation, the IBEW, CATCA and LCUC agreements and the agreement for the revenue postal operations unit, all require the establishment of formal union/management-consultation committees and specify the frequency with which those committees must meet.[21] They also protect full-time employees who are members of such committees against loss of normal pay by reason of attendance at meetings. The IBEW, CATCA and LCUC agreements require that an agenda be exchanged some days before each meeting to establish the subject(s) for discussion. The CUPW agreement, like the others, leaves the subjects to be discussed at the national and regional levels to be determined on an *ad hoc* basis, apart from a provision in a separate article[22] for consultation on productivity at the national level. However, the agreement is quite specific about the matters for consultation at the local level: changes in shift system, equal opportunity for overtime work, health and safety, and physical facilities for employees; all of these matters are already dealt with in particular contract clauses. Furthermore the CUPW agreement provides, as do some others, that any local agreement reached through consultation shall not contradict the applicable collective agreement, and that any agreement reached at the local level "shall require the approval of the authorized national official of the Union and an authorized national representative of the Employer."

Finally, some specific conditions have been written into consultation clauses. The CATCA and postal agreements, for example, declare that the consultation provisions must not be taken to imply unanimous or majority agreement, that they will not interfere with any management or union rights arising out of the collective agreement, and that they do not preclude meetings for discussion and consultation (outside the process of labour/management consultation specifically stipulated in the article) on any matter of mutual interest. The CATCA and electronics agreements point out, in addition, that:

> . . . a subject suggested for discussion may not be within the authority or jurisdiction of either the management or union-representatives. In these circumstances, consultation may take place for the purpose of providing information, discussing the application of policy or airing problems to promote understanding, but it is expressly understood that no commitment may be made by either party on a subject that is not within its authority or jurisdiction, nor shall any commitment made be construed as to alter, amend, add to, or modify the terms of this Agreement.

Employee Rights and Security Unrelated to Technological Change

A number of contracts, many of them negotiated by PIPS, contain an employee-rights clause stating that nothing in the agreement "shall be construed as limiting or eliminating any rights or obligations whatever, recognized or conferred upon any employee under any Federal or Provincial statutes, present or future."

The electronics agreement specifically protects employee rights not covered by the agreement, such as those flowing "from Acts, Regulations or Treasury Board Minutes"; it provides that such rights will not be modified during the term of the agreement without prior consultation with the union. The library-science unit has virtually integrated the Canadian Human Rights Act into its collective agreement by making alleged violations of that Act subject to grievance procedure as follows: "The parties to this collective agreement agree that any claim by an employee pertaining to a violation of the Canadian Human Rights Act may be the subject of a grievance which shall be processed in accordance with the grievance procedure provided for herein." In addition a few agreements reflect the spirit of that Act by stating that their provisions apply to males and females alike or by enumerating a comprehensive list of prohibited discriminatory practices. The most specific agreement in this respect is that between the National Film Board (NFB) and *Le Syndicat général du cinéma et de la télévision* (SGCT), which covers the administrative support, operational and technical categories. It states that there shall be no discrimination towards any employee by reason of age, marital status, sex, race, ethnic origin, creed or lack of creed, the fact that he has or has not a child or children, the existence of a criminal record, or a physical disability that does not prevent the employee from exercising the duties of the position he occupies or for which he applies. The agreement also prohibits discrimination against an employee because of membership or non-membership or activity in *Le Syndicat* or by reason of his exercising any right under the agreement or on grounds of political affiliation, provided that such political affiliation does not contravene provisions of the Public Service Employment Act concerning political partisanship. In addition the agreement provides that there must be no unfair treatment with respect to any employee-member of the SGCT executive committee who, as an official SGCT representative, has spoken, written or acted legally on behalf of *Le Syndicat*.

All collective agreements in the federal public service give employees the right to see their personnel file, usually once a year. Most provide that the employer will not introduce as evidence in a hearing relating to disciplinary action any document from the file of an employee if the employee was not made aware of the content of the document at the time of filing or within a reasonable time thereafter. Some collective agreements provide that a notice of disciplinary action in the personnel file of an employee is to be destroyed after two years, provided that no further disciplinary action is recorded within the same period. The agreements between the SGCT and the NFB go considerably further by providing that:

> The Employer will file every positive report concerning an employee in his official file.
>
> When the Employer receives a written report detrimental to the employee, he will notify the employee concerned of the report in writing within ten (10) working days of receiving the report. This written notice shall describe the origin of the report and will express the reasons for which there is dissatisfaction.
>
> The employee may reply to the notice received within ten (10) working days of receiving the notice and this reply will also be included in the employee's file.

While most collective agreements in the federal public service have clauses labelled 'performance review', only one agreement contains the possibility of redress if an employee should feel aggrieved by his assessment. A typical performance-review clause states:

> When a formal assessment of an employee's performance is made, the employee concerned must be given the opportunity to sign the assessment form in question upon its completion to indicate that its contents have been read. . . . An employee's signature on his assessment form will be considered to be an indication only that its contents have been read and shall not indicate his concurrence with the statements contained on the form.

Many agreements now provide that "The Employer's representative(s) who assess an employee's performance must have observed or been aware of the employee's performance for at least one-half (1/2) of the period for which the employee's performance is being evaluated."

The PAFSO agreement alone contains a mechanism for contesting an assessment. This is because of the traditional link between performance assessment and performance pay for employees covered by this agreement. However, as we shall see below, the provision for performance pay under the existing agreement, which is applicable to employees in the top salary range of this bargaining unit, has been rendered inoperative by the PSCRA. PAFSO members may contest a performance assessment as follows:

> A committee established by the Employer in consultation with the Association will make a fair review, upon the request of the employee concerned, of an employee's performance assessment for performance pay purposes when such assessment is less than "Fully Satisfactory". Such a request must be made by the employee concerned within thirty (30) days of his being notified of his final performance assessment.

A grievance procedure, including the right to be represented by the union at all levels of the procedure, is present in almost all the agreements.[23] The procedure follows a relatively standard pattern: a succession of steps culminating in third-party adjudication. Provision is to be found in most agreements for bypassing some steps in the procedure under particular circumstances and by agreement of the parties. Most agreements allow grievances over discharge to be initiated at the final level, that is, at the step immediately prior to adjudication. Special mention is usually made of grievances arising from NJC agreements, and it is generally provided that such grievances are to be handled according to NJC by-laws. As we noted in Chapter 5, above, these by-laws lay out a complex redress/grievance procedure up to and including adjudication.

Contract clauses on grievance procedure may appear, at first glance, to be broader in the public service than in the private sector. As we shall see, section 90 of the PSSRA confers on public service employees a statutory right, not dependent on contract, to present a grievance relating to any occurrence or matter affecting their terms or conditions of employment, whether covered or not by a contract or arbitral award, if no administrative procedure for redress in the matter of such term or condition of employment is provided in or under an Act of Parliament. All agreements in the public service contain a clause that, in effect, incorporates this provision. Since there are other procedures for redress relating to promotion, demotion, transfer and discharge for incompetence or incapacity, these matters are, of course, not covered by the collective agreements in the public service.[24] In addition, since, under section 91, the only grievances that may be referred to adjudication are those arising out of a collective agreement or arbitral award or certain types of disciplinary action, it would appear that the right to lodge grievances on matters not covered by a collective agreement or arbitral award has little or no relation to job security. While contract clauses on procedures and/or criteria for selection, promotion, demotion, transfer or lay-off are, in general, conspicuous by their absence, most agreements protect wage levels in the event of reclassification (as we shall see in the section on pay, below); a few make provision for advance notice of transfer[25] and for various adjustments arising from transfer, including opportunity for training.[26] There are a few provisions for advance notice to and consultation with the union over lay-offs arising from redundancy, notably in the event of technological change. While a few agreements provide for posting of vacancies and/or notification to the union that a vacancy exists or will occur, there is virtually no assurance that such vacancies will be filled by existing bargaining-unit personnel. A few agreements provide, however, that an employee who loses his position because of redundancy or lay-off may be appointed, without competition, to a vacancy in the same bargaining unit, provided that he is qualified, at a level no higher than that of his former classification. Only two agreements, both involving 'separate employers', give priority for reinstatement to a laid-off employee; one of these gives limited recognition to the principle of seniority as a criterion for lay-off and recall.

The agreement between SGCT and NFB, on behalf of the administrative support, operational and technical categories, gives an employee priority for reinstatement during a period of eighteen months from the date of his lay-off and provides, in addition, that his seniority will not be interrupted if he is reinstated within this period. The agreement between PSAC and the Northern Canada Power Commission (NCPC) for the operational category (non-supervisory) provides laid-off employees with similar protection, but only for a twelve-month period. The NCPC agreement also gives limited recognition to seniority as a factor in decisions on lay-off and recall.[27]

There is no mention in any agreement of length of probationary period after hiring and virtually no contractual protection against rejection on probation after promotion under agreements to which Treasury Board is a party. However, the agreement between SGCT and NFB, a separate employer not subject to the Public Service Employment Act, provides an exception in this respect, as well, by declaring that:

> ...if, within the probationary period, the employee decides not to accept the position or the Employer determines that the employee should not continue in the position or if at the end of the probationary period the employee is not confirmed in the position, he shall be reinstated in his former position. If his former position

> is not available . . . he shall be reinstated in a position in the same level within the same field of activities. This article does not apply during the probationary period of a new employee.

This agreement also provides that an employee who refuses a promotion or who is not confirmed in a position remains eligible for further promotions.

Although no agreement to which Treasury Board is a party contains a similar provision for job protection in the particular circumstance of rejection on promotion, CUPW negotiated the following provision, while still under the jurisdiction of the PSSRA:

> [An] employee who has completed his period of probation and who is trained in a new class of employment shall keep that class of employment or the equivalent thereof in the bargaining unit *when the unfavourable evaluation of his apprenticeship is to be ascribed to insufficient or inadequate training.*[28]
>
> Any employee who has completed his period of probation and who cannot fully obtain the necessary training by reason of a transfer, a reassignment or a change in a class of employment shall keep his former class of employment or the equivalent thereof in the bargaining unit.

The CUPW agreement specified, furthermore, that the training provided for in the article just quoted is to be given during regular hours of work and is to be considered as time worked for the purpose of remuneration.

There is no contractual protection against discharge for incompetence or incapacity, although a few agreements, notably in the Post Office, protect the employment, through reassignment, of workers who have become handicapped. An understanding reached during the 1979 negotiations between Treasury Board and CATCA and incorporated in a letter attached to the agreement provides basic salary protection for a minimum of one year to a controller no longer able, for medical reasons, to perform active control duties, provided that he has performed those duties for five years. This maintenance of salary is conditional on the employee's performing any other duties related to his technical background and/or experience for which he is medically fit. In the event that for medical reasons the employee is unable to perform such duties, he is required to utilize all earned leave credits during the one-year maintenance-of-salary period.

In contrast with the private sector, where seniority provisions are such an important aspect of job security and where seniority is frequently a determining factor in lay-off and recall, promotion and transfer, as well as in establishing other entitlements, the overwhelming majority of agreements in the federal public service have no seniority clauses as such. A handful of collective agreements covering postal workers (LCUC and CUPW), the operational category at the NCPC, and the technical, administrative support and operational categories at the NFB, make specific provision for the calculation of seniority and the preparation, maintenance and posting of seniority lists, as well as the accumulation of seniority on various forms of leave, including maternity leave,[29] sick leave, and leave without pay on union business or on lay-off. However, the use of the seniority provisions in these agreements is limited, in large measure, to choice of vacation period, selection of replacements within a classification, selection of shifts and preferred assignments, opportunity for training, and similar matters.

In January 1982, in its first collective agreement negotiated with the Post Office under the jurisdiction of the Canada Labour Code, LCUC obtained a provision for promotion by seniority, which, until that time, was a matter outside the scope of bargaining for the postal unions according to subsection 56(2) of the PSSRA.[30] Only two agreements negotiated under that Act give any recognition to seniority as a criterion for promotion. One is at the NFB which, as noted above, is not subject to the Public Service Employment Act. The agreement between the NFB and SGCT provides that in cases of equal competence, seniority is to be used as the decisive criterion for selecting an employee for promotion. However, this provision is subject to the condition that in certain positions, where employees are equally competent, under-representation of women or of men is the decisive criterion for employee promotion; where men and women are equally represented, seniority is the decisive criterion for employee promotion.

Similarly, at the NCPC, the only situation in which seniority is mentioned in a collective agreement as a criterion for lay-off and recall,[31] the agreement covering the operational category (non-supervisory) provides, in the matter of filling positions, that when "knowledge, comprehension and vocational training in relation to the position to be filled . . . and . . . skill, ability, dependability and efficiency in previous positions . . . are assessed as being equal, . . . the impasse shall be resolved by reference to the seniority factor."

Other provisions with respect to job security, such as the distribution of work during slack time, which now appears in a few agreements in the other sectors, are lacking in the federal public service. The same is true, by and large, of protection against contracting-out. Some protection against this practice is now provided in approximately one third of private sector contracts and in a few contracts in the provincial public services. Nearly two thirds of the collective agreements in the federal public service recognize the employer's right to contract out on the basis of a provision that the employer will give "all reasonable consideration to continued employment in the Public Service of employees who would otherwise become redundant because work is contracted out."

Protective clauses have been negotiated, however, in a few cases where the employment of non-bargaining-unit workers has been an issue — and a threat to job security. For example, the agreement for the technical category at the NFB states specifically that "the service of a freelancer shall not be obtained to circumvent the employment of regular employees." The most elaborate contract restrictions on the use of casual employees have been negotiated by CUPW to protect the job security of regular bargaining-unit employees. These provisions include a commitment by the employer to maintain up-to-date eligibility lists to fill vacant positions as they occur, to revise periodically the number of regular employees so that regular staff can meet normal postal service needs, to furnish the union with a monthly report of the hours worked by casual employees in each section of each post office, and to have in the work-force "[a] sufficient number of regular employees to cover the rate of normal absences due to illness, special leave, vacation leave and leave without pay." In the event that local consultation results in the vacation-leave period being compressed to other than that specified in the collective agreement, the employer is permitted, under the contract, either to hire casual employees, giving preference to students, or to offer additional work to regular employees, subject to a condition that the number of casuals or students must not exceed the number of employees on annual leave. In the event that high mail volumes necessitate the working of extra hours, the agreement guarantees regular employees the choice of performing additional and/or overtime hours before casuals may be hired. Extra hours during the Christmas period are staffed, first, by cancelling the days of rest for regular employees and increasing their daily working hours, subject to the willingness of these regular employees to do the extra work; next, by extending the hours of regular part-time employees, also subject to their willingness to work the longer hours; and, finally, by hiring casuals as Christmas helpers "according to the needs of each section".

There are clearly fewer job-security provisions in collective agreements under the PSSRA than in private sector contracts. On the other hand, there is a rather unusual provision for 'moonlighting' in a few of the public service agreements, covering approximately 40 per cent of bargaining-unit employees. Headed "Restrictions on Outside Employment", the following, from the clerical and regulatory (CR) agreement, is typical of such provisions, which are practically non-existent in both the private sector and the provincial public services.[32]

> Unless otherwise specified by the Employer as being in an area that could represent a conflict of interest, employees shall not be restricted in engaging in other employment outside the hours they are required to work for the Employer.

A few provisions have been negotiated to protect rights and needs specific to a particular group, such as air-traffic controllers, who, by the nature of their work, may be liable for damage or injury to third parties. For some years the CATCA agreement has imposed an obligation on the employer to provide legal advice and assistance to any controller required to appear before a coroner's inquest or other enquiry, or who is a party to civil legal action arising out of the performance of his duties. Similarly, in a letter of understanding appended to the agreement entered into between Treasury Board and the IBEW in August 1980, the employer agreed to indemnify bargaining-unit employees against liability arising from injury, death or property damage suffered by a third party and caused by an accident while an employee, in the normal course of performing his duties, is driving a motor vehicle owned by the employer. On the other hand, an attempt to negotiate malpractice and third-party-liability protection for nurses was not successful.[33]

Among the needs unique to particular groups are authorship rights for members of certain professions. These rights are protected in two collective agreements. Under the medicine agreement,

> The Employer agrees that original articles and technical papers prepared by an employee, within the scope of his employment, will be retained on appropriate departmental files for the normal life

> of such files; the Employer will not unreasonably withhold permission for the publication of such articles and technical papers in professional media and, at the Employer's discretion, recognition of authorship will be given where practicable in departmental publications.

The historical researchers, the only other unit with contractual protection for authorship rights, have negotiated a somewhat different provision:

> When an employee acts as a sole or joint author or editor of an historical publication, his authorship or editorship shall normally be shown on the title page of such publication.
>
> Where the Employer wishes to make changes in material submitted for publication with which the author does not agree, the author may request that he not be credited publicly.

Many professional agreements, as well as the agreement covering the electronics unit, oblige the employer to continue the existing practice of ensuring that employees have ready access to publications and/or manuals considered by the employer to be necessary to their work.

Technological Change

The technological change clause in the CUPW agreement provides an unconditional guarantee of employment and income security during the term of the contract in the event of introduction of technological change. This clause, granted by the employer under considerable duress, goes far beyond the permissible scope of bargaining under the PSSRA and beyond the protection provided in any other agreement negotiated under that Act.[34] It also goes beyond the job and income protection to be found in most technological change provisions in private sector agreements.

Technological change is defined, in the CUPW agreement, as the Post Office Department's introducing into the internal processing of mail "equipment different in nature, type or quantity from that previously utilized by the Department, and any related change in the manner in which the Department carries on internal processing of mail and any change in work methods and postal services operations affecting one or more employees."

To give effect to the employer's commitment to eliminate any adverse effects of technological change on the rights of employees, the collective agreement provides for:

- Detailed notice of technological change (including the nature of the contemplated changes, the locations involved, the employees likely to be affected, the anticipated effects on such employees) by the employer to the union at least 120 days before its introduction
- Meeting(s) between the parties, within fifteen days of receipt of notice by the union, to try to agree on solutions to any problems caused by the change; where no agreement is reached within forty-five days of the notice's receipt, the specific areas of disagreement to be referred to adjudication
- Any agreement reached through consultation between the parties or any decision handed down by the adjudicator to have effect equal to the provisions of the collective agreement and to be subject to the grievance procedure, up to and including adjudication
- Guaranteed employment "until the signing of the next collective agreement between the parties" (except as otherwise provided by the agreement), as well as a guarantee of classification and wage levels, with the proviso that an employee may voluntarily accept reassignment to another classification; if he does so, his existing wage rate would be maintained
- Retraining for reclassified employees
- An employee's written consent as a pre-condition for relocation, with the expenses thereof reimbursed by the employer, plus lump-sum compensation by the employer in the event of permanent displacement.

The Letter Carriers, while still part of the public service, negotiated a more comprehensive technological change provision than any bargaining agent in the service apart from CUPW. However, while the LCUC agreement provided a considerable measure of job and income protection, this protection was tied to employee willingness to accept reassignment, relocation and/or retraining. This compromise is in contrast to the unconditional guarantees provided in the CUPW agreement. The first LCUC agreement negotiated under the Canada Labour Code still ties job and income protection to willingness to accept reassignment, relocation and retraining. Like the earlier agreements under the PSSRA, the agreement just mentioned provides for such reassignment or relocation to be as close as possible to the post office where the employee is employed.

Like the CUPW agreement, the LCUC agreement requires a minimum of 120 days' advance notice of introduction of technological change. It also obliges the employer to provide virtually identical information to the union concerning the contemplated changes, the locations involved, the employees likely to be affected, and the anticipated effects on those employees. Moreover the LCUC agreement provides, as does the CUPW agreement, for consultation between the parties after notice of intention to introduce technological change has been given. A permanent bilateral committee chaired by an independent 'adviser', is responsible for examining and reporting on ways and means of dealing with the impact on employees of the anticipated change. Unlike the CUPW agreement, however, the LCUC agreement makes no express provision for adjudication of issues that are not resolved by the parties in the process of consultation.

No other collective agreement in the federal public service contains elaborate technological change provisions on the pattern of either of the major postal contracts. However, provisions are common for a minimum length of advance notice, ranging between three and six months. Such provisions are frequently, though not always, accompanied by a corollary provision for consultation. The following clause in the CATCA agreement is an example of a simple provision for notice, without mention of consultation: "At least ninety (90) days before the introduction of any major technological change which will result in a reduction of staff, the Employer shall notify the Association of the proposed change." Where agreements provide for consultation on means to cushion the impact of change, they usually contain a preliminary statement on the advantages of technological change. However, they seldom specify formal consultation mechanisms. They make no provision for the resolution of disagreements that arise in the course of consultation and, with rare exceptions, are silent on employment protection. The following provision from the most recent agreement for the program-administration unit is typical:

> Both parties recognize the overall advantages of technological change. Both parties will therefore encourage and promote technological change and improvements in the Program Administration field.

> The employer agrees to provide as much advance notice as is practicable but not less than three months written notice to the Alliance of any major technological change in equipment which would result in changes in the employment status or working conditions of employees as provided for in this Agreement. In addition, the Employer agrees to consult with the Alliance with a view to resolving problems which may arise as a result of the introduction of such technological change.

Only three agreements to which Treasury Board is a party, outside the Post Office, make specific provision for training, in their clauses on technological change. The agreement negotiated by PSAC on behalf of the drafting and illustration unit in the technical category provides, in addition to advance notice and consultation, that "When notice of technological change is given . . . the Employer will ensure that appropriate training is provided to those employees affected by such a change in technology." Contracts covering ship-repair workers on both the east and west coasts provide that the councils of unions representing them:

> ...shall be informed in advance of all training courses related to technological change and, except when prevented by unforeseen circumstances or short notice, the Employer agrees to display in appropriate locations notices of forthcoming job-related training courses. Management will consult with the Council when establishing training criteria for such courses.

Hours of Work and Overtime

Fifty per cent of federal public service employees have a five-day, one-shift, work week. Forty per cent are on continuous operation, working three shifts, seven days a week. The remainder are on a variety of work schedules: three shifts, five days a week or two shifts, six or seven days a week. Over two thirds of the collective agreements which, in turn, cover approximately two thirds of federal public service employees, provide for a 37 1/2-hour work week. About 30 per cent of federal public servants have a forty-hour work week.[35] One unit, financial administration, has a 36 1/4-hour work week; another, printing operations, has a thirty-five-hour work week. Only one other unit has a shorter one. The air-traffic controllers work 33 1/2 hours a week. These working hours tend, on average, to be shorter than in the private sector, but longer than in the provincial public services. A few agreements point out that their provisions regarding hours of work do not guarantee minimum or maximum hours. Most make some mention of part-time work, usually by providing, as in the following clause from the engineering and scientific support agreement, that employees whose normal hours of work are fewer than those specified in the hours-of-work clause of the collective agreement "shall be entitled to the benefits provided under this agreement in the same proportion as their weekly hours of work compare with the normal scheduled weekly hours of work of full-time employees." This provision is always subject to certain qualifications, to be discussed below, relating to overtime payment, days of rest, and leave entitlements. Only the CUPW and LCUC agreements place specific limits on hours of work for regular part-time employees: non-supervisory 'inside' postal workers are to work not more than twenty-five hours per week (averaged over a twelve-week period), and non-supervisory letter carriers are to work not more than thirty hours per week (averaged over the same period). CUPW and LCUC have also included a provision under their agreements whereby "the Employer agrees that part-time employees shall be used only for part-time operational requirements and that, whenever practicable, such positions shall be combined in order to create full-time positions." No other agreement contains a similar restriction on the use of part-time employees.

Depending on the nature of the work involved, an agreement may provide for 'normal hours' to be averaged over a period of time as, for example, in the agreement involving the foreign service unit. This agreement states that "hours of work shall average thirty-seven and one-half (37 1/2) hours per week over a fifty-two (52) week period." This arrangement applies, also, to some professional occupations where a rigid time schedule would clearly be incompatible with the nature of the work, and where variations in time, as well, are calculated within a yearly total. Thus, for example, the agreement between Treasury Board and PIPS, on behalf of the scientific research unit, declares that "the conduct of scientific research requires an adaptable research environment. . . ." Accordingly the agreement provides for "every reasonable effort" to be made

> ...to maintain a research environment where working hours can be arranged to meet the needs of research programs.
>
> The normal work year, subject to the leave provisions of this agreement, shall be nineteen hundred and fifty (1950) hours. The

> normal work year shall be from April 1st to March 31st of the following calendar year, inclusive. Subject to the approval of the Employer, the hours of work shall be arranged to suit an employee's individual research project(s).

Similarly the agreement between PIPS and the National Research Council (NRC) that applies to the research-officer and Research Council-officer grades states that the Council's policy is to "operate its laboratories in a flexible and adaptable manner consistent with a research environment" and that "the parties will attempt to maintain a research environment which permits each employee to arrange his working hours to meet the needs of individual research programs." Accordingly, as in the case of the scientific research unit, the agreement for the NRC research-officer and Research Council-officer unit specifies the same total annual hours of work, rather than providing a strict schedule of weekly or daily hours. Both the agreements just mentioned provide, however, that "subject to operational requirements", the normal work week shall be 37 1/2 hours and the normal work day 7 1/2 hours, with two consecutive days of rest during each seven-day period.

A few agreements that cover the meteorology, translation, psychology and scientific support units, as well as some others, recognize the right of the employer to vary the schedule of working hours per day and/or week in line with seasonal requirements. The translation agreement adds a condition that the total annual hours may not be changed by this practice. Other agreements recognize that because of the nature of the work, changes in work schedules must be made on a regular basis. Under agreements for the ship-repair units on both the east and west coasts, for example, the parties "recognize the requirement for certain employees to regularly report for work and to cease work at different hours" from those established in the clause setting out shift schedules. Accordingly "the Employer agrees to discuss with the Council such changes in working hours before implementing them."

Provisions for consultation on changes in shift schedules appear in some agreements, as well as provisions for advance notice to employees of such changes and, occasionally, provision for monetary compensation to an employee in case of insufficient notice. Some agreements provide for 'average' daily and weekly hours for employees who work on a rotating or irregular basis. Typical of such provisions is the following clause from the engineering and scientific support agreement:

> For employees who work on a rotating or irregular basis:
> (a) Normal hours of work shall be scheduled so that employees work:
>   (i) an average of thirty-seven and one-half (37 1/2) hours per week and an average of five (5) days per week,
>   and either
>   (ii) seven and one-half (7 1/2) hours per day,
>   or
>   (iii) an average of seven and one-half (7 1/2) hours per day where so agreed between the Employer and the majority of the employees affected.

Provisions for flexible work time have been negotiated for a wide range of occupational units which, by July 1981, covered approximately 25 per cent of the bargaining-unit employees in the public service. This proportion is slightly less than in the provincial public services, but significantly greater than in the private sector, where, according to Labour Canada figures for July 1981, barely 5 per cent of bargaining-unit employees enjoyed some provision for 'flextime'. It should be noted, however, that the figures for July 1981 underestimate the total for the federal public service. For one thing, those figures do not include the provision for flextime in the program-administration contract concluded shortly after this date. The program-administration unit covers over 20 000 employees. Moreover a significant number of employees in the federal public service work on a schedule of flexible hours, even when these are not specifically provided under collective agreements. Treasury Board policy permits department heads to introduce flexible hours at their discretion. The following clause in the electronics agreement is typical of contract provisions for flexible work time on a daily basis:

> Subject to operational requirements as determined by the Employer from time to time, an employee shall have the right to select and request flexible hours between 7 a.m. and 6 p.m. and such request shall not be unreasonably denied.

Where the flextime provision is for a compressed work week, as it is in a number of agreements, a caveat with respect to overtime is always included. The physical sciences agreement, for example, states in its hours-of-work clause that:

> Notwithstanding the provisions of this Article, upon request of an employee and the concurrence of his Employer, an employee may complete his weekly hours of employment in a period other than

> five (5) full days provided that over a period of 14 calendar days the employee works an average of 37 1/2 hours per week.
>
> . . .
>
> Notwithstanding anything to the contrary contained in this Agreement, the implementation of any variation in hours shall not result in any additional overtime work or additional payment by reason only of such variation, nor shall it be deemed to prohibit the right of the Employer to schedule any hours of work permitted by the term of this Agreement.

Other agreements have virtually identical wording.

As in the other sectors, federal public service agreements contain various provisions for breaks during working hours: for example, paid rest periods, wash-up time and meal periods. Almost all the agreements have some overtime provisions. However, while private sector contracts make provision for voluntary overtime, or for some right to refuse overtime, for nearly 50 per cent of the employees they cover, this right exists for less than 20 per cent of bargaining-unit employees in the federal public service. This figure is about the same as in provincial government employment. However, most contracts in the public service make some provision for equal distribution of overtime, as do most contracts in the other sectors.

Almost all agreements in the federal public service provide for overtime rates. Approximately 60 per cent of bargaining-unit employees get time-and-a-half after regular daily working hours; most of the rest get time-and-a-half followed by double time after a certain point. This arrangement is virtually the same as in the private sector. Over half the federal employees are also covered by provisions for overtime, calculated on a weekly basis; 41 per cent of these employees get time-and-a-half, and 15 per cent get time-and-a-half followed by double time at a certain point. Most agreements in the federal public service provide for payment of overtime rates for Saturdays and Sundays not normally worked. The rate for a Saturday not normally worked is time-and-a-half, followed by double time at a certain point for 63 per cent of federal employees. Approximately 22 per cent get double time for all hours worked on a Saturday not normally worked. Nearly 100 per cent get double time for all time worked on a Sunday not normally worked. These overtime rates for week-ends not normally worked are far higher than in the private or provincial public sectors. Some agreements limit overtime compensation to days of rest not normally worked. This arrangement is made, for example, when employees are on a compressed work week or a twelve-month work year.

As we have mentioned above, there is a standard provision in compressed work-week clauses that "the implementation of any variation in hours shall not result in any additional overtime work or any additional payment by reason only of such variation." However, compressed work-week clauses may provide specifically for days of rest as in the psychology agreement, which states that "in every 14 day period such an employee shall be granted days of rest on such days as are not scheduled as a normal work day for him." The agreement between PIPS and NRC for the research-officer and Research Council-officer unit states of an employee permitted to arrange his hours of work to suit his particular research projects, that when he "is called back to work by the Council at any time outside his normal working hours, such hours involved will form part of the nineteen hundred and fifty (1950) hours as stated in clause 12.02." (This clause provides for normal hours of work on an annual basis, as discussed above.) The same agreement provides for overtime rates to be paid to such employees on days of rest or designated holidays, and for overtime rates beyond hours normally worked for any other employee whose hours of work on his particular research project are established by the Council, rather than at his own discretion.

Similarly the foreign service officers, except for the most senior category (FS-3), receive extra compensation only for hours of overtime worked on an employee's 'days of rest' and for all hours worked on a statutory holiday. These overtime provisions do not apply where a foreign service employee is required either to 'stand by' at home or to attend social engagements.

Over 50 per cent of federal public employees (and approximately the same proportion in the provinces) have the choice, under their collective agreements, of time off in lieu of overtime pay. This is true of less than 10 per cent of employees under private sector agreements. Some agreements provide for 'lieu time' to be given contiguous to the vacation period if operational requirements permit. Provisions for banking of overtime have been negotiated for approximately 15 per cent of federal government employees, a marginally higher proportion than in the other sectors.

A handful of federal agreements for professionals such as doctors and dentists make no provision for daily or weekly hours of work for the calculation of overtime. However, some 'professional' provisions have been negotiated as an alternative to standard overtime clauses. The medical agreement, for example, makes the following provision for 'Extra Professional Services':

> When an employee is employed at a remote location, as determined by the Employer, where
>
> (a) in the opinion of the Employer, the employee is subject to unusual demands on his time due to the absence of readily available professional assistance,
>
> and
>
> (b) the employee is required to provide continuous medical service without an opportunity for at least one-half (1/2) of his normal days of rest and holidays free of a requirement by the Employer to be available to report for duty,
>
> the employee shall be credited with compensatory leave of one (1) to three (3) days (the amount to be determined by the Employer) for each completed month of employment at that location.

Compensatory leave earned under the above clause

> ...will normally be granted any time prior to September 30 following the fiscal year in which it is earned. Any unused portion of such leave remaining to the credit of the employee on September 30 shall be paid in cash at the rate of the employee's daily rate of pay[36] as of March 31 of the fiscal year in which the leave was earned unless a written request has been received from the employee for carry-over of such leave credit to be used as compensatory leave at a later date.

The dental unit is covered by a similar provision. Lighthouse keepers, like the doctors and dentists, are rewarded for extra time worked with compensatory leave, rather than with overtime pay or allowances; this arrangement stands in contrast to those of most other units, where employees may choose between the two forms of compensation. The lightkeepers' agreement provides for compensatory leave in the event that "an employee is on duty for 24 hours or more or required to be available for continuous professional service due to lack of professional assistance."

Pay

Pay Increases

Provisions for general wage increases effective at staggered intervals are found in all negotiated agreements in the federal public service, as they are in the private and provincial public sectors. These negotiated increases are in addition to automatic, or job-progression, increases as public service employees move through the range of rates for each job classification.[37]

However, as we have seen,[38] incremental increases are to be withheld from employees whose salary range, as of 29 June 1982, has an annual maximum that reaches or exceeds $49 500. This restriction is in effect for the duration of the period for which the provisions of the PSCRA are applicable in any particular case. Incremental increases in other situations will continue to be paid.[39] Negotiated increases that appear in existing collective agreements, on the other hand, are to be rolled back, without exception, to the ceiling imposed by the PSCRA.[40]

Cost of Living Allowance (COLA)

CUPW, LCUC and the railway mail clerks have cost-of-living-allowance (COLA) clauses in their agreements which, at the time they were negotiated, covered approximately 16 per cent of employees bargaining under the PSSRA. Since the Post Office is now a Crown corporation, no federal government employees are protected by a COLA provision.[41] In contrast, 60 per cent of bargaining-unit employees in the private sector are covered by COLA clauses, and in the provincial public services 30 per cent of such employees are so covered.

Performance Pay

Provisions for performance pay have been quite common for 'excluded employees'[42] in the federal public service. Moreover, until they were temporarily suspended by the PSCRA, such provisions were a major feature of compensation policy for the recently established SM category.[43] Nevertheless, performance-pay provisions have seldom been found in negotiated agreements. A performance-pay clause formerly contained in the scientific research agreement was deleted in the most recent negotiations at the insistence of the bargaining agent (PIPS).[44] This leaves only two agreements under which pay increases for all bargaining-unit members are specifically tied to performance; one of these agreements covers the foreign service (PAFSO) unit, and one covers the defence scientific service (PIPS) unit. Of the two, only the PAFSO agreement contains a performance-pay plan in the 'classic' sense. The PAFSO plan provides for a basic increase (in other words, an increase 'across the board' at each classification level), with merit increases, in addition, of 2, 4, 6 and 8 per cent per annum, or such proportion of these percentages as would bring an employee to the maximum of his range, for performance assessed respectively as "acceptable", "fully satisfactory", "superior" or "outstanding".[45] The Defence Scientific Service pay plan, which was under review in 1982, provides guide-lines, based on periodic merit review, for advancement through pay and classification levels, rather than specific performance increases as in the PAFSO agreement. A complex formula under the (Defence Scientific Service) DSS Plan provides for normal or faster progression through both classification levels and pay ranges within each level, depending on whether the assessment of an employee's "productivity and state of professional development" is "distinctly superior compared to the normal expectations, . . . within the normal expectations [or] satisfactory but distinctly less than the normal expectations . . . for his years of relevant experience and appointment level." The expectations and standards for performance evaluation naturally become higher as the employee's years of experience and responsibility of assignments increase.[46] The plan would deny advancement to the next step in the scale to an employee whose performance is assessed as "less than satisfactory". Finally, the agreement for the research-officer and Research Council-officer unit at NRC allows payment at a rate or rates beyond the upper limit in the salary scale, to members of the bargaining unit at the most senior classification levels, that is, principal research officer and Research Council officer 5, in recognition of "exceptional merit".

As with general wage increases, contractual provisions for performance or merit pay could, sometimes at least, be rendered inoperative by the PSCRA for the period in which it is applicable. Merit increases and performance awards for employees are now subject to the same restraints as are incremental increases discussed above. In other words, performance increases are to be withheld, on the basis of the PSCRA, from employees whose salary range, as of 29 June 1982, has an annual maximum that equals or exceeds $49 500.

While provisions for pay increases based on performance are limited to the three agreements noted above, a few agreements provide for withholding a regular pay increment, as distinct from a negotiated increase, because of unsatisfactory performance. For example, the drafting and illustration agreement states:

> The Employer may deny a pay increment to an employee if it is satisfied the employee is not performing the duties of his position satisfactorily. Where the Employer intends to deny a pay increment to an employee it shall, at least two (2) weeks but not more than six (6) weeks before the due date for the pay increment to the employee, give the employee in writing the reason for the denial.
>
> Where the Employer has denied an increment it may grant the increment on any Monday prior to the expiry of the increment period following and the employee shall retain his increment date. The Employer shall review the employee's performance after three months of the date of denial and decide whether or not the employee's increment should be granted.

Other agreements imply as much by referring, directly or indirectly, to Public Service Terms and Conditions of Employment Regulations on pay administration.[47] The following statement taken from the article on *Pay* in the clerical and regulatory (CR) agreement is typical: "Except as provided in this Article, the terms and conditions governing the *application of pay* to employees are not affected by this agreement."[48]

Pay Guarantees

Negotiated agreements in the federal public service contain a variety of pay guarantees; many of these are common in the other sectors. These guarantees include, among other arrangements, reporting and call-back or call-in pay, stand-by and temporary transfer or 'acting' pay. Other pay guarantees in federal agreements reflect concern over potential loss of pay in case of classification, reclassification and/or transfer that are non-negotiable. Accordingly a significant proportion of agreements provide that rates of pay for any new classification established during the contract period will be subject to negotiation. However, since compensation plans have, for all practical purposes, been 'frozen' during the period of operation of the PSCRA, and since the term 'compensation plan' is defined to include the provisions, however established, for the determination and administration of compensation,[49] it is questionable whether such a provision in a collective agreement will remain subject to negotiation.

Provisions to protect an employee's pay in the event of reclassification of his position or transfer to a position in a lower classification are common. The following clause from the CUPW and LCUC agreements is typical of provisions for pay protection by red-circling that appear in many agreements:

> Where an employee's duties and responsibilities have been reclassified to a level with a lower maximum rate of pay, he will continue to be paid in his former range of rates for one year at which time the rate he is then being paid shall become his holding rate. An employee shall continue to be paid his holding rate until such time as the maximum for his new level is equal to or greater than his holding rate at which time he shall be paid the maximum of his new level.

A few agreements add a condition to the red-circling provision, by specifying that the pay protection provided in case of reclassification or appointment to another classification with a lower maximum rate than the employee's existing salary shall not apply to employees reclassified because of incompetence or incapacity. This is actually standard practice under Public Service Terms and Conditions of Employment Regulations.

A memorandum of understanding between PSAC and Treasury Board, entered into in June 1978, provided for pay protection by red-circling, in various circumstances, for employees in all units represented by the Alliance. This was replaced, in February 1982, by a memorandum of understanding that goes considerably further. According to the more recent memorandum which, like the one it replaced, is applicable to all collective agreements between PSAC and Treasury Board, an incumbent of a position reclassified to a group and/or level with a lower maximum rate of pay remains eligible for all salary increases in his original classification level until such time as the maximum rate in his new classification becomes greater than that for his former classification level. In other words, an 'encumbered position' that has been reclassified downward is "deemed to have retained for all purposes the former group and level", and the new rate of pay only takes effect once the position has been vacated. The memorandum of understanding provides, however, that the employer make "a reasonable effort to transfer the incumbent to a position having a level equivalent to that of the former group and/or level of the position." Should an incumbent, in such circumstances, decline an offer of transfer "to a position . . . in the same geographic area, without good and sufficient reason", he would lose the right to 'Salary Protection

Status' and "be immediately paid at the rate of pay for the reclassified position."

There is an overlap in wage rates between classifications in the federal public service: the maximum in a lower classification is often higher than the minimum in the classification immediately above. Because of this, some bargaining agents have negotiated a contractual guarantee of pay increase on promotion. The following clause in the CUPW agreement is an example of pay protection on promotion that is provided, with some variation in wording, in several other agreements, as well:

> An employee promoted to a higher level shall receive a rate of pay within the new scale of rates that is higher than the rate he was receiving before promotion by at least one full salary increment at his new level, provided that the new rate does not exceed the maximum of the new level.

The wording in LCUC's agreement is identical. It should be noted, in this connection, that the PSCRA does not preclude salary increases based on promotion or reclassification.

Premium Pay and Allowances

A majority of agreements in the federal public service provide for extra pay in certain circumstances, including premium pay for overtime, week-end or holiday work, and shift differentials, as well as allowances for hazardous[50] and 'dirty' work;[51] all of these provisions are found, in one form or another, in negotiated agreements in other sectors. Other supplementary allowances under federal agreements, some of which may be unique, include the following: extra pay for specified tasks outside the normal course of duty, such as sea duty performed by electronics technicians;[52] diving duty by ship-repair crews; flight inspection for the general labour and trades; work on experimental aircraft in flight by NRC employees in the research-officer and Research Council-officer grades; special responsibility allowances in the nursing and education agreements[53] and a supplementary education allowance in the nursing agreement;[54] and the 'terminable allowance' introduced in the physical sciences agreement to meet the specific problem of recruitment and retention of oil geologists and engineers, as discussed in Chapter 8, below.[55]

Job-related Expenses

Provision for reimbursement of certain job-related expenses, such as transportation and travel costs, as well as allowances for clothing required by the job, and meal allowances in particular circumstances such as overtime and/or call-back are found in agreements in all sectors. However, the provision in some federal agreements for reimbursement of registration or membership fees in professional associations or governing bodies, as a job-related expense, may be unique. Practically all agreements for bargaining units in the scientific and professional category and for more than half the units in the administrative and foreign service category[56] require the employer to reimburse an employee for his payment of membership or registration fees to a professional association or other organization when the payment of such fees is necessary to maintain a professional qualification required by the employer for the continuation of the duties of the employee's position. Likewise, in the technical category, agreements for the electronics and aircraft-operations units provide that an employee will be reimbursed for payment of such licence fees as may be necessary for the continued performance of the duties required of him by the employer. The CATCA agreement declares, in addition, that the employer shall reimburse an employee for payment of fees incurred in obtaining the annual medical examination required "to maintain the validity of his Air Traffic Controller Licence."

Severance Pay

Severance-pay provisions in the federal public service are considerably more generous than in the other sectors. All collective agreements provide, at a minimum, for severance pay related to length of service, in case of lay-off, resignation or retirement, and for severance benefits to an employee's estate, in case of death. Excluded employees are entitled to severance pay in the same circumstances. In addition a majority of collective agreements made in the past few years have extended severance-pay entitlements to employees rejected on probation or discharged for incompetence or incapacity. All severance-pay benefits are calculated on the basis of the weekly rate of pay to which an employee "is entitled for the classification prescribed in his certificate of appointment on the date of the termination of his employment."

A typical severance-pay clause provides, in case of "a first layoff after June 1, 1969", for two weeks' pay for the first complete year of continuous employment and one week's pay for each additional year, to a maximum benefit of twenty-eight weeks' pay. In case of a second or subsequent lay-off, after the same date, an employee is entitled to one week's pay for each year of continuous employment, with a maximum benefit of twenty-seven weeks' pay, less any period in which the employee may previously have been granted severance pay.

As for severance-pay benefits on resignation, an employee with ten or more years of continuous employment is entitled to one half-week's pay for each complete year of continuous employment up to a maximum of twenty-six years, for a maximum benefit of thirteen weeks' pay. This provision does not apply to an employee who has reached the point of entitlement to an immediate annuity or annual allowance under the Public Service Superannuation Act; such an employee is entitled to a retirement benefit of one week's pay for each complete year of continuous employment, with a maximum benefit of twenty-eight weeks' pay.[57] In case of death, an employee's estate receives one week's pay for each year of continuous employment to a maximum of twenty-eight weeks' pay, regardless of any other benefit payable.

Contractual provisions for severance benefits in case of "release for incompetence or incapacity" under section 31 of the Public Service Employment Act, or of rejection on probation under section 28 of that Act, following a second or subsequent appointment, represent a relatively recent development. There is an eligibility requirement of "more than one year of continuous employment" in the former case and "more than two years of continuous employment" in the latter. Agreements providing for severance pay in these circumstances allow one week's pay for each complete year of continuous employment, with a maximum benefit of twenty-eight weeks' pay in case of release for incapacity and twenty-seven weeks' pay for loss of employment because of rejection on probation.

Finally, it should be noted with respect to severance-pay provisions that all agreements contain an overriding condition, of which the following clause in the CR agreement is typical: "Severance benefits payable to an employee under this Article shall be reduced by any period of continuous employment in respect of which the employee was already granted any type of termination benefit."

Holidays and Vacations

Most collective agreements in the federal public service specify eleven statutory holidays.[58] In contrast, 50 and 60 per cent of the agreements made in the private and provincial public sectors respectively provide more holidays.

Virtually all collective agreements in the federal public service, as in the other sectors, specify some condition for eligibility for paid holidays, such as work on the day before or after the holiday. They also provide for a work day off with pay when a paid holiday falls on a Saturday or Sunday not normally worked. The most common payment for holiday work in the federal contracts is straight time plus time-and-a-half for normal hours worked, followed by double time after normal hours. A few collective agreements provide for regular pay plus double time for normal hours and triple time for overtime. Some agreements provide for time-and-a-half for a holiday worked, combined with a 'lieu' day off. A few others compensate holiday work entirely by lieu time off.

Vacations are more or less standardized across the public service. Most employees have the right to take their vacations at the time they prefer, "subject to operational requirements",[59] and to receive vacation pay in advance on request. When an employee ceases to be employed or dies, he or his estate is entitled to be paid for the number of days of his earned, but unused, vacation pay. There are also some provisions for carrying over unused vacation days to the following year.

Most collective agreements under the PSSRA now provide for three weeks' vacation in the first year of service, four weeks after ten years, and five after twenty-two years. Faster entitlement to four weeks' vacation was a major issue in the CUPW negotiations of 1981. The CUPW agreement, signed in August of that year, provided for four weeks' vacation after eight years of employment. LCUC followed suit a few months later in its first agreement negotiated under the Canada Labour Code. While the CUPW settlement broke new ground on vacations in the operational category, several groups in the scientific and professional category already enjoyed earlier entitlement to a four-week vacation period. These include the dentistry, medicine, nursing, occupational and physical therapy, and translation units, whose members are eligible for four weeks' vacation after only two years of service, the pharmacy unit with four weeks after three years, and the library-science unit. This last group already had four weeks' vacation after eight years' service when the CUPW agreement was being negotiated; it now has four weeks after seven years. Since these units in the scientific and professional category are relatively small and highly specialized, they are unlikely to set a pattern for units in other categories.[60] It was thought that since the CUPW settlement represented a large number of employees in the operational category, it might have a pattern-setting effect in the public service, but this has not proved true so far. Major agreements negotiated subsequently (for example, the agreement for the CR unit) have not followed suit.

Federal government employees are eligible for three weeks' vacation sooner than employees in the private sector, where two weeks' vacation after one year's service is the general rule. Private sector employees also work up to four weeks' vacation at a slower rate, but generally reach the five- and six-weeks' vacation entitlement at an earlier stage than do employees in the federal sector. Most provincial employees start with three weeks' vacation after one year of service, but gain entitlement to additional weeks after fewer years of service than do the federal employees. Although approximately 30 per cent of provincial government employees and about 10 per cent of private sector employees have the opportunity of taking pre-retirement vacations, this opportunity is not a part of the federal contracts. However, this lack does not represent a loss for federal government employees as the provision for severance pay on retirement in the federal public sector has virtually no counterpart in the other sectors.

Other Leave Entitlements

Collective agreements in the federal public service provide for various leave entitlements, paid, unpaid, and partially paid; some of these are standard in the other sectors, but many of them represent innovations that place federal government employees significantly ahead.

Leave with Pay (General)

Paid leave of absence for up to four days when there is a death in the employee's immediate family is available to virtually all employees negotiating under the PSSRA; only a handful have more or less. The majority get one day's bereavement leave in the case of death of other relatives. Ninety-eight per cent get five days' paid marriage leave, subject to advance notice and a service requirement, usually of one year. Virtually all male employees get one day of paid paternity leave. Ninety-four per cent of bargaining-unit employees get one day's paid leave of absence for the adoption of a child; a handful get two days, while a few collective agreements covering less than 5 per cent of all such employees still receive no adoption leave. Regular pay for jury duty is also virtually universal in the federal public service, as it is in the other sectors. Practically all agreements have a 'personnel-selection-leave' provision, under which:

> ...an employee who participates as a candidate in a personnel selection process for a position in the Public Service . . . is entitled to leave with pay for the period during which the employee's presence is required for purposes of the selection process, and for such further period as the Employer considers reasonable for the employee to travel to and from the place where his presence is so required.

Sick leave and injury-on-duty leave with pay are also standard entitlements. Some leaves, such as adoption leave, are qualified in that a decision as to whether they are reasonable is left to "the discretion of the Employer". This qualification also applies to leave for educational purposes, described in the section below, and to sick leave beyond a period covered by earned credits.[61]

Education Leave (Partially Paid)

Provisions for leave of absence to further an employee's education are common in federal public service agreements and cover over 80 per cent of bargaining-unit employees; most of the exceptions exist in the operational category.[62] While approximately the same proportion of employees in the provincial public services enjoy education-leave entitlements, education leave is rare under private sector contracts.

A typical contract provision for education leave under the PSSRA appears in the following clause in the CR agreement:

> An employee may be granted education leave without pay for varying periods up to one (1) year, which can be renewed by mutual agreement, to attend a recognized institution for studies in some field of education in which preparation is needed to enable him to fill his present role more adequately or to undertake studies

> in some field in order to provide a service which the employer requires or is planning to provide.

However, although the education-leave clauses invariably state that such leave shall be 'without pay', most agreements provide for some compensation, at the discretion of the employer. This compensation usually provides up to 50 per cent of 'normal pay', in the form of an 'education-leave allowance'. Some such clauses guarantee a basic minimum pay. Under a few agreements, the education allowance could go as high as 100 per cent of normal salary, depending on the degree to which the education leave is deemed by the employer to be relevant to organizational requirements. Some agreements specify that the education-leave allowance that might otherwise be granted to an employee must be reduced by the amount of any grant, bursary or scholarship the employee may receive.

Virtually all agreements impose, as a condition of granting education leave, that the employee undertake "to return to the service of the Employer for a period of not less than the period of the leave granted." Should the employee fail to complete the course, fail to resume employment with the employer on completion of the course, or cease to be employed before the termination of the period he has undertaken to serve after completing the course, he would be obliged, under all education-leave clauses, to repay the employer the allowances he has received.

Career and Professional Development Leave (Paid)

'Career-development leave' with pay, as distinct from education leave with or without pay, is fairly common; it appears in about half the agreements outside the scientific and professional category, where contracts provide instead for 'professional development' leave. The following provision, from the CR agreement, is typical of career-development clauses:

> (a) Career development refers to an activity which in the opinion of the Employer is likely to be of assistance to the individual in furthering his career development and to the organization in achieving its goals. The following activities shall be deemed to be part of career development:
>   (i) a course given by the Employer;
>   (ii) a course offered by a recognized academic institution;
>   (iii) a seminar, convention or study session in a specialized field directly related to the employee's work.

(b) Upon written application by the employee, and with the approval of the Employer, career development leave with pay may be given for any one of the activities described in sub-clause (a) above. The employee shall receive no compensation under Article 26 (Overtime) and Article 28 (Travelling Time) during time spent on career development leave provided for in this clause.

(c) Employees on career development leave shall be reimbursed for all reasonable travel and other expenses incurred by them which the Employer may deem appropriate.

The following provision from the meteorology agreement is an example of the 'Professional Development Leave' clauses which, with slight variations in wording, are found in all agreements covering employees in bargaining units in the scientific and professional category bargaining with Treasury Board and in a few bargaining units among the separate employers:

(a) The parties to this Agreement share a desire to improve professional standards by giving employees the opportunity on occasion;
  (i) to participate in seminars, workshops, short courses or similar out-service programs to keep up to date with knowledge and skills in their respective fields,
  or
  (ii) to conduct research or to perform work related to their normal research programs in institutions or locations other than those of the Employer.
  (iii) to gain familiarity with procedures and practices used elsewhere which are related to their duties. Each visit shall be arranged to take into account the experience of the employee and the benefit to be derived from such visits to the employee's operating unit.

(b) An employee may apply at any time for professional development under this clause, and the Employer may select an employee at any time for such professional development.

(c) When an employee is selected by the Employer for professional development under this clause, the Employer will consult with the employee before determining the location and duration of the program of work or studies to be undertaken.

(d) An employee selected for professional development under this clause will continue to receive his normal compensation including any increase for which he may become eligible.

(e) An employee on professional development under this clause shall, except in the case of prior mutual agreement, be

> reimbursed for reasonable travel expenses and such other additional expenses as the Employer deems appropriate.

Attendance at Conferences, Conventions or Seminars

Leave with pay for attendance at conferences, conventions or seminars is a particular feature of professional agreements in the federal public service, but is not limited to those agreements. The majority of agreements in the scientific and professional category, as well as in the administrative and foreign service category, contain clauses of which the stated intent is to permit the employee to benefit from an exchange of knowledge and experience with his professional colleagues. Agreements covering employees in some other categories among the separate employers contain similar clauses. There is also a similar clause in the agreement in the technical category covering the electronics unit for which Treasury Board is the employer. There is usually considerable flexibility in these provisions by which the employee is permitted to apply, on his own initiative, to attend 'a reasonable number' of conferences or conventions related to his field of specialization; the actual number of such conferences to be attended is left to the discretion of the employer.[63] These clauses also provide for the payment of 'reasonable expenses' incurred in attending such gatherings, including registration fees, which are always subject to budgetary and operational constraints as determined by the employer. In addition they contain somewhat more specific provisions, particularly with respect to travel expenses, for employees attending a conference in an official capacity, either as a representative of the employer or to present a paper or give a course. The following clause, taken from the biological sciences agreement, is typical of such provisions which, incidentally, all make clear that they do not include entitlement to overtime or travelling-time compensation:

> An employee who attends a conference or convention at the request of the Employer to represent the interests of the Employer shall be deemed to be on duty and, as required, in travel status.
>
> An employee invited to participate in a conference or convention in an official capacity, such as to present a formal address or to give a course related to his field of employment, may be granted leave with pay for this purpose and may, in addition, be reimbursed for his payment of registration fees and reasonable travel expenses.

Sick Leave

Government employees are protected by paid sick leave rather than by insurance programs, such as weekly indemnity, when absent from work because of short-term illness; such insurance programs are more common in the private sector. Approximately 70 per cent of private sector employees covered by collective agreements enjoy some form of weekly indemnity insurance; only 50 per cent have paid sick leave under their agreements. Paid sick leave is virtually universal in government employment. Sick-leave credits for bargaining-unit employees, as well as for excluded employees, are built up in the federal service at the rate of 1 1/4 days each month for a total of fifteen days per year, although there is provision for additional 'sick days' with pay, at the discretion of the employer, when sick-leave credits have been used up. Sick-leave credits can be accumulated indefinitely during the period of employment, but unused sick-leave credits cannot be reimbursed when employment terminates.

Provincial government employees accumulate sick-leave days at a slower rate than their federal counterparts: 64 per cent have at least fifteen such days per year; half can accumulate sick-leave credits indefinitely, while 35 per cent are covered by some provision for reimbursement.

Maternity Leave

Maternity leave for federal government employees is considerably longer than is generally required by statute.[64] All federal government employees are entitled to a maximum of eleven weeks' leave before and twenty-six weeks' leave after the date of confinement; choice of the amount of time taken is basically left up to the employee. The federal agreements provide that maternity leave be counted for the calculation of 'continuous employment' for the purpose of calculating severance pay and vacation leave. Time spent on maternity leave is also counted for pay-increment purposes. During such leave the employer continues to pay its applicable share of pension and benefit plans. These provisions also apply to excluded personnel. Most maternity leave is unpaid, apart from the fifteen weeks of maternity benefits to which all workers are entitled under Unemployment Insurance legislation which allows for 60 per cent of salary up to a maximum, in 1982, of $210 per week.

However, the CR agreement signed in the summer of 1980 broke new ground with a provision for payment by the employer of an allowance equivalent to unemployment-insurance benefits during the two-week waiting period under the Unemployment Insurance legislation.[65] This arrangement was followed in a number of agreements negotiated subsequently. More recently, in the summer of 1981, CUPW negotiated a provision under which the employer agreed to pay 93 per cent of an employee's regular salary during the two-week period before the receipt of unemployment-insurance benefits and the difference between the unemployment-insurance payments and 93 per cent of the employee's regular salary during the remaining fifteen weeks of statutory maternity leave. These supplementary benefits, adjusted to include any annual increment for which an employee may become eligible during the period of maternity leave, are available only to an employee who has completed six months of continuous employment before commencing maternity leave. They are subject to an undertaking by the employee to return to work on the date of the expiry of her maternity leave, unless this date is modified with the employer's consent, and to remain in the employer's employ for a period of at least six months after her return to work; failing this, she would be obliged to repay the employer the amount received as maternity-leave allowance. Two agreements negotiated subsequently under the PSSRA for the translation and CR units, as well as the LCUC agreement negotiated under the Canada Labour Code, provide a guarantee of 93 per cent of regular salary for seventeen weeks of maternity leave. During this period the employer is to pay the full 93 per cent for two weeks and the difference between the amount of unemployment-insurance benefits and 93 per cent of the employee's salary for fifteen weeks; the payments are to be adjusted to include any annual increment for which the employee may become eligible during the period of maternity leave, as in the CUPW agreement. Eligibility for the maternity payments under these agreements is subject to the same qualification as in the CUPW agreement.[66] Although a number of other collective agreements were concluded before the enactment of the PSCRA, including an agreement for the predominantly female nursing unit, none of them contains the 'CUPW clause' on maternity-leave benefits. A pattern had not been established, as some originally expected. The maternity-leave benefits under collective agreements in force when the PSCRA was enacted are unlikely to be improved to any significant extent while that Act remains in effect. Although, as we shall see later, it is possible to trade off part of the wage increase permitted under the PSCRA for an improvement in maternity benefits, only two bargaining units had done so in the first six months following the enactment of the controls legislation.[67]

Leaves and Benefits (Paid and Unpaid) Related to Family Responsibilities and Other Personal Needs

An innovative package of family-related benefits virtually without counterpart in the other sectors was first introduced in the CR agreement in the summer of 1980. It was simultaneously incorporated into Treasury Board's overall policies on leave and benefits, thereby making it applicable to non-bargaining-unit employees as well. The package, with minor modifications, has been incorporated in all agreements negotiated subsequently. It includes a combination of paid and unpaid leave entitlements and provisions for various family-related needs, including those related to maternity, paternity, adoption, care of children, illness, other family responsibilities, and situations where an employee's spouse is relocated; there is also a general provision for leave without pay for 'personal' needs. These innovative leave provisions go far beyond those of the private sector, where less than 10 per cent of employees are covered by provisions for family-related needs. Provincial government employees appear to be midway between the private sector and the federal public service with respect to types of family leave. Although there have been some variations or refinement of the family-responsibility package in more recently negotiated federal agreements, all include the basic elements that originally appeared in the CR contract in the summer of 1980.

The broad definition of 'family' in this first family-responsibility provision was itself an innovation. The CR agreement stated — and others have followed the pattern — that family, for the purpose of the clause, would be "defined as spouse (including common-law spouse resident with the employee), dependent children (including children of legal or common-law spouse), parents (including step-parents or foster-parents) or any relative residing in the employee's household or with whom the employee permanently resides." An employee may take up to one half day of leave with pay

> ...to take a dependent family member for medical or dental appointments, or for appointments with school authorities or adoption agencies . . . and up to two consecutive days of leave with pay for the temporary care of a sick member of the employee's family, the total leave for these reasons combined not to exceed five days in a fiscal year.

The family-responsibility package includes entitlement, subject to advance notice, to paternity leave without pay for a period beginning on the date of birth of his child or at a later date requested by the employee and ending not later than twenty-six weeks after the date of the birth of his child. This is subject to the condition that "paternity leave without pay and maternity leave without pay after termination of pregnancy utilized by an employee-couple in conjunction with the birth of their child shall not exceed a total of 26 weeks for both employees combined." As in the case of the maternity-leave provision described in the previous section of this chapter, time spent on paternity leave is "counted for the calculation of 'continuous employment' for the purpose of calculating severance pay and vacation leave" and for pay-increment purposes; in addition the employer continues to pay its required share of pension and benefit plans during such leave.

Adoption leave without pay, subject to advance notice, is available to an employee (sex unspecified) for a period beginning on the date of acceptance of custody of a child below the age of majority or at a later date requested by the employee, and ending not later than twenty-six weeks after the date of such acceptance of custody. This is qualified by a provision that "adoption leave without pay utilized by an employee-couple in conjunction with the adoption of a child shall not exceed a total of 26 weeks for both employees combined." As with maternity and paternity leave, time spent on adoption leave is counted for the calculation of continuous employment for the purposes of calculating severance pay and vacation leave and for pay-increment purposes. Likewise the employer undertakes to pay its required share of pension and benefit plans during this period.

The family-responsibility package also provides for leave without pay, at the request of an employee, for "the care and nurturing of pre-school age children". Such leave may be taken at one or more periods, to a total maximum of five years, during an employee's total period of employment in the public service. However, if an employee on such leave wishes to maintain contributor status to pension and benefit plans, he or she must pay both the employee's and the employer's share of contributions while on such leave. This provision differs from the provisions applicable to maternity, paternity and adoption leave, described above. The provision for leave without pay "for the care and nurturing of pre-school-age children" states that such leave shall be deducted from the calculation of continuous employment for the purpose of calculating severance pay and vacation leave, and that time spent on such leave shall not be counted for pay-increment purposes.

A provision for leave "subject to operational requirements" for unspecified "personal needs" entitles an employee, *once* during his or her total period of employment in the public service, to unpaid leave for a period of up to three months and *once* for a period of more than three months, but not exceeding one year. Where leave is taken for up to three months, the employer continues to pay its share of pension and benefit plans. Where the leave is for "more than three months but not exceeding one year", the employee must pay both the employer's and the employee's share of contributions to pension and benefit plans in order to maintain contributor status. Leave without pay for the period of more than three months is deducted from the calculation of continuous employment for the purpose of calculating the employee's severance pay and vacation leave. Time spent on such leave is not counted for pay-increment purposes. It may be presumed, in the absence of any provision to the contrary, that 'personal leave' for the shorter period does not entail similar loss of benefits.

Finally, the family-responsibility package provides for leave without pay for a period of up to one year for an employee whose spouse is permanently relocated, and makes the same provision for a period of up to five years for an employee whose spouse is temporarily relocated. Unless time spent on leave without pay for this purpose is for less than three months, it is deducted from the calculation of continuous employment for the purpose of calculating severance pay and vacation leave and is not counted for pay-increment purposes. Under the provision for leave without pay for relocation of a spouse, the employee taking such leave, for whatever period of time, must pay both the employer's and the employee's share of contributions to pension and benefit plans in order to maintain contributor status.[68]

Health, Welfare and Safety

Health and Welfare Plans

Entitlement to certain health and welfare plans that are available on a service-wide basis frequently does not appear in the form of negotiated clauses in collective agreements. As we have seen, this is true of benefits under the extended health-care plan, that is, the GSMIP, to which all public service employees have access on a voluntary and contributory basis. Premium payments for this plan, now shared equally by the employer and the employee, as well as employer contributions to public medicare and hospital-insurance plans, are mentioned as a subject "appropriate for consultation" in a few collective agreements. Such contractual provisions, however, have been made inoperative for the period of application of the PSCRA. The GSMIP itself was listed among matters for negotiation in NJC before the enactment of the PSCRA but, as we saw earlier, the matter of employer contributions to this plan comes within the purview of that Act. For this reason, employer contributions cannot be negotiated in NJC while the restraint program remains in effect. While the federal government presently pays 50 per cent of basic medicare premiums for all employees in its service — a matter on which the agreements are silent — contracts covering 65 per cent of bargaining-unit employees in the private sector and 48 per cent in the provincial public services provide for payment of 100 per cent of medicare premiums by the employer. No federal government employees are covered by a dental plan in a collective agreement or otherwise. In contrast, 55 per cent and 48 per cent of bargaining-unit employees in the private sector and provincial government services respectively enjoy collectively negotiated dental plans. Under a third of these plans, the employer pays 100 per cent of the premiums; the others operate on a shared-cost basis.[69]

All agreements under the PSSRA provide for injury-on-duty leave with full pay for a period to be determined, in each instance, at the discretion of the employer.[70] Non-bargaining-unit employees have access to injury-on-duty leave on the same basis. In the provincial public services 75 per cent of bargaining-unit employees receive full pay for injury-on-duty leave, in contrast to only 6 per cent in the private sector. About 50 per cent of collective agreements under the PSSRA mention a long-term disability (LTD) plan that is available, on a shared-cost basis, to all employees in the public service. Only 32 per cent of bargaining-unit employees in the private sector have access to a LTD plan under their collective agreements. In 15 per cent of such plans, however, the employer pays the full premium cost. Fifty per cent of provincial government agreements mention a LTD plan, and about 25 per cent of provincial employers pay the full premium. All collective agreements, as we noted earlier, have provisions for paid sick leave, which is available on virtually the same basis to all non-bargaining-unit employees in the public service.[71] Pension benefits, not mentioned in the federal public service agreements, are available on a service-wide basis under the non-negotiable Superannuation Plan; its cost is shared by the employer and the employees. These benefits were formerly indexed to the cost of living. However, under the austerity program initiated by the federal budget on 28 June 1982, the Honourable Allan J. MacEachen, then Minister of Finance, stated:[72] "Effective January 1, 1983, indexation of the pensions paid to former . . . public servants will be limited to 6 per cent. The indexing factor will be lowered to 5 per cent as of January 1, 1984." The legislation that was eventually enacted to limit pension increases allows for somewhat higher ceilings than those proposed in the budget. The increases are to be limited to 6.5 and 5.5 per cent for the respective years.[73] The majority of employees in other sectors also have access to some form of pension plan. In some agreements in the other sectors, the employer assumes the full cost of such plans.

Federal public service employees have no provision for life insurance under their collective agreements. However, the clauses on severance pay, as we have seen, provide for payment of severance benefits, based on length of service, to an employee's estate in case of death. In addition there is a death benefit of one year's salary under the Superannuation Plan. Eighty-five per cent of all private sector and provincial government employees covered by collective agreements enjoy some form of life-insurance plan under their agreements. The employer pays 100 per cent of the premium for 70 per cent of bargaining-unit employees in provincial government employment and for 50 per cent of such employees in the private sector.

Occupational Health and Safety

The equipment and program provisions under health and safety clauses in numerous federal agreements and the environmental protection provided in the CUPW agreement are generally in advance of such arrangements in the other sectors. The government's concern with health and safety is also reflected in a substantial number of Treasury Board directives applicable throughout the public service and in the Treasury Board's *Handbook of Occupational Health and Safety*, now in its third edition. Federal public service employees also have access to rehabilitation programs provided by the Department of Health and Welfare and available to all employees, although there are no contract provisions to this effect. Approximately 8 per cent of bargaining-unit employees in the private sector have access to rehabilitation programs through a collective agreement.

Most collective agreements in the federal public service contain a health and safety clause. Some are of a very general nature; for example, the meteorology agreement states that:

> ...the employer shall continue to make all reasonable provisions for the occupational safety and health of employees. The employer will welcome suggestions on the subject from the Institute [PIPS], and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.

Virtually identical clauses may be found in most other agreements negotiated by PIPS, as well as in a number of agreements to which PSAC is a party and where white-collar occupations are involved. However, PSAC has negotiated more elaborate safety provisions in some agreements; these include the establishment of union/management safety committees "at appropriate levels in government departments", for units such as the general labour and trades (GLT) and others where hazards to health and safety may be higher than in office or clerical work. It is stated in the GLT agreement and repeated with minor variations in numerous other agreements, that local safety committees:

> ...shall meet as required to make recommendations on matters of occupational health and safety, within the scope of the policies, procedures and standards prescribed by the Employer, and which are designed or intended to prevent or reduce the risk of occupational injury and illness. The parties agree to encourage employees to observe all safety rules and to use all the appropriate safety equipment.

Provisions for consultation at higher levels appear in some agreements as, for example, in the engineering and scientific support agreement. In addition to the above provision, that agreement states that "where a matter cannot be resolved locally it may be referred for consultation at the appropriate level safety or union-management consultation committee." The electronics agreement provides specifically for a national safety committee in addition to committees at the local level and sets out the duties and responsibility of the committees at each level. The local committees are required to "meet periodically for the correction of unsafe or potentially harmful work practices, . . . review and examine reports of serious accidents and . . . carry out inspection of work sites when this is warranted by circumstances and make recommendations." The national committee which, like the local committees, is composed of an equal number of representatives of the employer and the union is empowered "to review the activities and reports of the various local committees, to review accident frequency and accident severity records, to promote health and safety education on a national basis, and to recommend procedures and techniques designed or intended to prevent or reduce the risk of employee injury."

In addition to the standard provisions in safety clauses, the electronics agreement provides that "in the interest of safety the employer will continue to provide all training it considers necessary to employees." The same agreement also makes specific provision for the maintenance of medical services and facilities. Similar provisions appear in the postal agreements, as we shall see below.

Some safety provisions are specific to particular occupational groups. For example, the interpreters, although they work in a white-collar atmosphere, are concerned with potential danger to their hearing. This is reflected in a unique safety provision, as follows:

> The employer shall continue to make all reasonable provisions for the occupational safety and health of employees, among other things, obtaining as soon as possible the installation of electronic equipment to protect the hearing of interpreters. The Employer will welcome suggestions on the subject from the Union, and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.
>
> The employee may be relieved by the unit head of any interpretation assignment involving technical equipment or

> facilities which do not meet the minimum standards laid down by the technical committee of the Canadian Government Specifications Board. The Employer shall make available to the interpreter without cost, for the duration of his employment with the Government of Canada, an individual head set the specification of which shall be such as to guarantee the protection of his hearing.

The veterinary science agreement requires the employer to "provide an employee with immunization against communicable diseases transmissible from animals when so requested by an employee." Similarly, the nursing agreement obliges the employer to "provide the employee with immunization against communicable diseases where there is a risk of incurring such diseases in the performance of his duties." The employer is further obliged, under the nursing agreement, to provide a pre-employment physical examination, including chest X-ray,[74] for a new employee and an annual health evaluation for all employees. The agreement for the ships' officers unit makes provision for periodic inspection of vessels that have living accommodation. Under the ship-repair agreements (east and west coast), "the employer recognizes the value of safety belts or barriers in vehicles not designed for the carrying of passengers and will endeavour to provide vehicles with such equipment for transporting employees."

The most elaborate and detailed safety clauses have been negotiated by CUPW and LCUC. Their contracts provide for joint union/management health and safety committees at various levels and for intervention by an independent third party when the two sides of a committee cannot resolve a dispute. Both agreements oblige the employer to conduct investigations of accidents and other health hazards and guarantee the right of the union to be represented at such investigations. They oblige the employer to provide employees with clothing and equipment necessary to their safety and with any training necessary for the safe performance of work assignments. The CUPW agreement, in addition, obliges the union to encourage members to observe safety precautions and to inform management when working conditions deteriorate. Management, in turn, is obliged to prevent and correct problems thus drawn to its attention. The CUPW agreement also places a specific obligation on employees to observe safety rules, to use or wear the required safety equipment or protective clothing, and to inform their superior if a protective device is missing or defective.

Both postal agreements provide for first-aid kits to be available at appropriate locations and for first-aid training, without loss of pay, for selected employees. They also specify that any medical examination of an employee, required by the employer, will be conducted without loss of pay or any other cost to the employee, and they provide for free transportation to a doctor or hospital in the event of serious illness or injury on the job. Both agreements allow time for an employee assigned to operate a mobile vehicle to make a safety inspection of the vehicle before each shift and restrict the operation of certain motorized vehicles or equipment to employees designated by the employer as qualified operators. They place specific restrictions on the weight an employee may be required to lift and allow a worker to refuse to perform work or operate a vehicle that appears to him to be dangerous.[75]

The right of refusal of dangerous work is qualified, under the CUPW agreement, by the provision that an employee may not exercise this right "if the refusal to perform this work places the life, health, safety or physical well-being of another person in immediate danger or if the danger that could justify the refusal is inherent in the kind of profession, trade or occupation exercised by the employee. . . ." The CUPW agreement declares, in addition, that an employee who seeks, for frivolous reasons, to take advantage dishonestly of this clause will be liable to disciplinary penalties. It also has a unique provision for environmental protection which, like the right to refuse to do dangerous work, first appeared in the last agreement negotiated[76] under the PSSRA (1981). This provision requires periodic investigation and inspection of conditions in the work environment, such as dust and noise levels, and lays down measures to correct the situation where investigations show that environmental conditions do not meet "standards as determined by the National Joint Health and Safety Committees and those issued under the Canada Labour Code."

Notes

1. Comparative figures cited in this chapter are based on unpublished Labour Canada data on federal, provincial, and private sector collective agreements as of July 1981. They represent an analysis of all agreements negotiated under the PSSRA, all agreements covering 200 or more employees in the provincial public services, and all agreements covering 500 or more employees (excluding those engaged in construction) in the private sector. For a tabulation of selected provisions in collective agreements in the federal public service and inter-sectoral comparisons, see Table 9, below. For information on contract clauses and the agreements in which they appear in the federal public service, updated on a quarterly basis, see *Analysis of Federal Public Service Collective Agreements — Statistical Analysis* (Ottawa: Pay Research Bureau) and *Analysis of Federal Public Service Collective Agreements — Wording Analysis* (Ottawa: Pay Research Bureau). For sample wording of clauses, updated periodically, see *Index of Clauses Found in Federal Public Service Collective Agreements* (Ottawa: Pay Research Bureau). All provisions cited in this chapter, unless otherwise specified, are from federal public service collective agreements in effect at the time of writing.
2. Superannuation benefits are excluded from bargaining under paragraph 56 (2)(*b*) of the PSSRA. See above, Chapter 4, pp. 185–87 and Chapter 5, pp. 230–32, for further discussion of this topic.
3. The Group Surgical and Medical Insurance Plan, available to all public service employees on a voluntary contributory basis, with employee contributions matched by the employer, is rarely mentioned in collective agreements. Before the enactment of the PSCRA, however, it was a subject for discussion in National Joint Council; so was the Disability Insurance Plan, which is available on the same basis. As we saw in Chapter 5, p. 240, above, the PSCRA now precludes negotiations over employer contributions to such plans.
4. See above, Chapter 5, p. 226, for list of items that until the enactment of the PSCRA were the subject of NJC consultation and could be included in a collective agreement. See also Chapter 5, pp. 240–41, for the items that remain negotiable in the NJC while the PSCRA is in effect and for a discussion of those items that are excluded because they fall within the purview of that Act.
5. As noted above, in Chapter 5, p. 224, unions can opt out of specific agreements reached in the NJC. However, this has happened only with the Letter Carriers Union of Canada (LCUC) and the Clothing Policy. LCUC has historically included clauses on clothing in its collective agreements.
6. Discussed in Chapter 4, pp. 154–55, above.

7. Responsibility for staffing in the major portion of the public service is the exclusive prerogative of the Public Service Commission, discussed in detail in Chapter 4, pp. 174–76, above. See also Chapter 4, pp. 193–94, above, and Chapter 12, note 4, below, concerning union security.
8. See also Chapter 3, note 69, above. A provision for compulsory check-off of union dues for non-union as well as union members of the bargaining unit, popularly known as the 'Rand Formula' in Canada and the 'agency shop' in the United States, applied, as of July 1981, to approximately 55 per cent of employees covered by collective agreements in the private sector and 80 per cent in the provincial public services.
9. Virtually all collective agreements in the provincial government services, like those in the federal public service, provide for leave of absence for union business. However, approximately 25 per cent of collective agreements in the private sector are silent on this point.
10. Little more than half the agreements in the private sector provide compensation for time spent in grievance work.
11. See pp. 315–16, below.
12. Educational support-unit agreement (Treasury Board and PSAC).
13. Translation-unit agreement (Treasury Board and CUPTE).
14. National Film Board, technical, operational and administrative support-unit agreement (*Syndicat général du cinéma et de la télévision* [SGCT]).
15. Computer-systems agreement (Treasury Board and PIPS).
16. Postal operations non-supervisory 'inside workers'-unit agreement (Treasury Board and CUPW).
17. Electronics-unit agreement (Treasury Board and IBEW).
18. Computer-systems agreement (Treasury Board and PIPS).
19. Ship-repair agreements (east and west coast); non-supervisory 'inside' postal workers' agreement.
20. One of the most comprehensive and complex provisions for dealing with problems that arise in mid-term was included in the 1975 collective agreement for the non-supervisory 'inside' postal workers under the heading, 'Technological Change'. See pp. 325–26, below. The CUPW agreement also provides for consultation on "any proposed change, addition or deletion in job classification (job title and job description)" whether or not technological change is involved.
21. The IBEW and CATCA agreements require that the national and regional committees meet at least once every six calendar months and more frequently if desired; the frequency of meetings at the

local level is to be determined by mutual agreement. The LCUC agreement requires at least monthly meetings at all levels.

22. Article 41, Measurement and Surveillance, frequently referred to as the 'productivity agreement', states, in part:

> It is recognized that volume measurement is necessary to obtain an objective evaluation of the level of production of a group, a section or an office and there shall be no individual work measurement.
>
> Recognizing that the paid lunch period is given in consideration of the work output of the forty (40)-hour week being maintained and that this requires an increase in productivity and that both parties share the responsibility of maintaining the work force output of the forty (40)-hour week, meetings will be held at the national level through the consultative process prescribed in the article on consultation with a view to improving productivity and to assess the results achieved.

See also Chapter 4, p. 191 and note 254, for discussion of proposals regarding surveillance and the provision of the agreement relating to that practice.

23. For the few collective agreements in which a grievance procedure is lacking, see Chapter 11, note 35, below.

24. On the matter of grievances relating to classification, see Chapter 11, note 20, below.

25. A new clause in the collective agreement for the electronics unit, signed 1 August 1980, provides that "whenever practicable, advance notice of a change in posting or transfer shall be given to an employee. Such notice shall not normally be less than three months." The clause provides, in addition, that "every reasonable effort will be made to effect such posting or transfer of an employee during his children's vacations from school."

26. There are some provisions in the postal agreements on the right to training, as distinct from retraining, under the technological change provision. The CUPW agreement provides, for example, under a clause headed 'Right to Training', that:

> . . . training must be sufficient and adequate. The Employer must give such training to:
>
> a. any newly hired employee;
> b. any employee who moves from a position to another or who is assigned to duties requiring new knowledge;
> c. any employee who moves from one class of employment to another.

Under the LCUC agreement, "where an employee is successful in a bid for a job which requires special qualifications for which the employee needs training, a sufficient and adequate training period will be provided." The LCUC agreement also provides that new employees entering the bargaining unit will be given a sufficient and adequate training period before being assigned to regular duties.

27. See pp. 321–22, below.
28. Emphasis added.
29. A provision first negotiated for the CR unit in the summer of 1980 and since extended virtually throughout the public service declares, with reference to maternity leave, that the period of leave shall be "counted for the calculation of 'continuous employment' for the purpose of calculating severance pay and vacation pay. . . ."
30. See Chapter 4, pp. 174–75, above.
31. See also Chapter 5, p. 238, above.
32. While 'moonlighting' is a relatively common practice in the private sector, the question of conflict of interest does not arise in the same way as in the public service. See discussion on conflict of interest in Chapter 11, pp. 579–81, below.
33. See Chapter 4, p. 168, above.
34. For a discussion concerning the referability of the technological change provision, see Chapter 4, pp. 178–80, above.
35. Most of these are in the operational category and include, among other groups, the postal units, the general labour and trades and general services units, correctional services and ship-repair units, and hospital services units.
36. The daily rate of pay in the medical agreement is calculated by dividing the weekly rate of pay by five. The weekly rate, in turn, is derived by dividing the annual rate by fifty-two.
37. Some contracts provide that when the dates for a regular pay increment and a negotiated increase coincide, the pay increment shall be applied first.
38. See Chapter 4, pp. 166–67, above.
39. House of Commons Debates, 9 July 1982, p. 19183.
40. See Chapter 8, pp. 377–78, below.
41. Only one other bargaining unit in the federal public service has ever been covered by COLA. The information-services unit was awarded a COLA clause in an arbitral award (*Information Case* [1974] Arbitral Awards file 185-2-86). In the next round of bargaining, the bargaining agent again requested the inclusion of a COLA clause in the award. The request was denied without reasons being given (*Information Case* [1976] Arbitral Awards file 185-2-128).
42. This includes employees excluded because of the confidential nature of their functions, many of whom have been receiving

performance pay at departmental discretion, as well as those excluded by virtue of managerial functions, most of whom, by definition, are included in the new senior management category and are paid according to the remuneration policy for that category. See above, Chapter 2, pp. 43–45, for details on the establishment of the SM category.

43. The bonus system of performance pay in the SM category was introduced as an incentive to improve the quality of management. It differs from the payments for superior and outstanding performance under the system of senior merit pay it replaced in that the bonus payment must be re-earned each year through the maintenance of a high level of performance. In any year in which a bonus for superior performance is received, that bonus is included in the calculation for pensions, vacation pay and severance pay, as were the 'superior' and 'outstanding' payments under the former system of senior merit pay. If, in any subsequent year, the performance bonus is not re-earned, the employee ceases to be eligible for calculation of the bonus in the tally of these entitlements.

44. Unions generally object to performance-pay plans on the ground that the employer arbitrarily limits the proportion of employees classified as superior for purposes of performance pay.

45. Members of the foreign service bargaining unit are rated twice yearly by their superiors at posts abroad, once for purposes of performance pay, once for purposes of promotion. The agreement provides for an increase, on promotion, of 4 per cent or such greater amount as would bring an employee's salary to the minimum salary rate for the higher level. It has been suggested by some PAFSO spokesmen that performance pay may sometimes be granted by the employer as a substitute for promotion. Others have expressed concern that the formula does not take into account the very significant differences in the nature of overseas postings; they suggest that 'acceptable' or 'satisfactory' performance in a hardship post should probably entitle an employee to a percentage increase equivalent to that for 'superior' performance in a more desirable posting.

46. The three principle criteria for assessment are:
    - Effectiveness in scientific research, development and analysis
    - Effectiveness in representational and human relations activities
    - Effectiveness and productivity in managerial activities.

    Each of these is described in detail in annex B of the defence scientific service-unit pay plan.

47. An employee whose performance is considered unsatisfactory by the Employer may be denied a pay increment under Public Service Terms and Conditions of Employment Regulations.

48. Emphasis added.

49. PSCRA, subsec. 2(1).

50. Premium pay for hazardous duty, such as the height-pay allowance for the ship-repair units, is similar to hazardous pay provisions in the private sector. For a rather unusual provision in the federal public service with respect to danger pay, note the 'penological factor allowance' for employees in the federal penitentiary service. These cover a wide range of occupations including, but not limited to, doctors, dentists, nurses, teachers, psychologists, occupational and physical therapists, and workers in the purchasing and supply, clerical and regulatory, general services, and electronics units. The amount of a penological factor allowance is based on the nature of the institution in which the worker is employed (maximum, medium or minimum security) and the frequency and closeness of his contacts with inmates.

51. See, for example, a new provision in the agreement signed 1 August 1980 for the electronics unit:

> Subject to the prior approval of the Master before work is commenced, an employee who is required to work in bilges and/or spaces below the bottom deck plates for periods in excess of fifteen (15) minutes, shall be paid at one and one half (1 1/2) times his straight-rate for every fifteen (15) minute period worked or part thereof or at the applicable overtime rate whichever is the greater.

52. The electronics agreement distinguishes between sea duty on surface vessels and on submarines; premium pay on the latter vessels is significantly higher than on the former.

53. The nursing agreement contains a clause specifically labelled 'Responsibility Allowance', which provides premium pay in a specified list of hospitals in particularly isolated locations for nurses at Level 5 whose regular duties "include the duties of Assistant Director of Nursing on a regular basis." Likewise, under the education agreement, a principal of a school or a supervisor of education in a penitentiary is to be paid an allowance for administrative and supervisory responsibilities related to the number of teachers in the school or penitentiary. The education agreement also provides an extra allowance to a teacher employed in the Department of Indian and Northern Affairs who is the only teacher in a one-room school.

54. Hospital and community-health nurses in grades 1-4 are paid an 'Education Allowance' for post-graduate nursing training, in addition to their regular salary. The amount of such allowance is related to the length and level of training.

55. See Chapter 8, pp. 383–84.

56. Administrative services, financial administration, information services, purchasing and supply, program administration, and welfare programs.

57. Provisions for severance pay in case of retirement are also applicable to part-time employees who have worked on a regular basis for more than 13 1/2 hours, but less than 30 hours, a week.

58. These are: New Year's Day, Good Friday, Easter Monday, "the day fixed by proclamation of the Governor in Council for celebration of the Sovereign's Birthday", Canada Day, Labour Day, "the day fixed by proclamation of the Governor in Council as a general day of Thanksgiving", Remembrance Day, Christmas Day, Boxing Day, and "one additional day in each year that, in the opinion of the Employer, is recognized to be a provincial or civic holiday in the area in which the employee is employed, or in any area where, in the opinion of the Employer, no such day is recognized as a provincial or civic holiday, the first Monday in August."

59. Some agreements provide for compensating an employee for financial loss incurred in case of cancellation of a planned vacation or recall from vacation because of operational requirements.

60. A few other cases of longer-than-average vacation entitlement are so specific to particular circumstances that there is no question of a pattern-setting effect.

    Elementary or secondary school teachers working a twelve-month year in the Department of Indian and Northern Affairs are entitled to the same designated holidays (that is, Christmas breaks, Easter or mid-winter breaks, and summer breaks) as observed by the school boards of the province or territory in which they work.

    The translation agreement provides that "an employee who is normally required to perform work days of varying length with irregular hours, because he works on parliamentary debates or carries out duties that require his periodic assignment to Parliament, shall receive special compensation in the form of sessional leave", in addition to his annual leave, to be taken during the intersessional period. The formula for determining the length of sessional leave takes into account the number of work days during the year that the House of Commons was in session. The same agreement provides special compensation of up to forty days, in the form of 'interpretation leave', to interpreters not assigned to a Parliamentary section or the multilingual section.

    A memorandum of agreement attached to the CR agreement provides for compensatory leave, in addition to any annual leave, for certain employees of the Department of the Secretary of State whose work schedule is different from that provided in the agreement for the members of the bargaining unit because of the former's duties in connection with the Debates of Parliament, including committee proceedings, as well as resolutions, questions, or other work of Parliament. The compensatory leave is calculated according to a formula similar to that for calculating sessional leave for the translation group.

61. See section on sick leave, p. 348, below.

62. These figures for July 1981 include the postal agreements, which were among the few in the operational category with education-leave provisions.

63. Flexible provisions for attendance at professional conferences, combined with the provisions noted above on professional development and education leave, the payment of licensing and membership fees in professional associations, and the protection of authorship rights in a few cases, give professionals in the federal public service considerably more contractual privileges related to professional needs than are given to employees in most other sectors. However, some interesting professional clauses negotiated by professional employees in at least one of the provinces, Quebec, do not appear in the federal agreements. These include protection against incursions from para-professionals, guarantees that professionals will not be required to do work other than that requiring professional training, and the right to refuse to sign any document that, in the opinion of the employee, does not meet professional standards.

64. Ss. 59.2 and 59.3 of the Canada Labour Code, R.S.C. 1970, c. L−1, as amended by S.C. 1974−75−76, c. 66, s. 23, set out the right of an employee to seventeen weeks' maternity leave. Similar provisions exist under most provincial statutes.

65. The Unemployment Insurance Act, S.C. 1971, c. 48, s. 23, requires a two-week waiting period before an employee becomes eligible to receive unemployment-insurance benefits.

66. The only instance of better maternity-leave benefits is in the Quebec public sector, where employees are guaranteed 93 per cent of their salary for a twenty-week period, with the employer paying the full amount during the first two and last three weeks, when the worker is not eligible for unemployment benefits, and the difference between unemployment benefits and 93 per cent of regular salary for fifteen weeks. An employee in the Quebec public service also has the opportunity of taking an unpaid leave of absence for up to two years after the birth of a child.

67. See below, Chapter 8, p. 380.

68. Collective agreements, like Treasury Board policy statements, are silent about the manner in which employees on extended leave will be reintegrated into the public service.

69. The first agreement negotiated by LCUC under the Canada Labour Code provides for a dental plan that came into effect in

1982. Under this plan the employer pays 50 per cent of the premiums. The agreement also provided for the employer's contribution to a provincial medicare plan, formerly less than 50 per cent, rising to 70 per cent, effective 1 January 1983. However, the PSCRA would appear to have precluded the implementation of this provision.

70. If not sufficiently recovered to return to work at the end of such period, an employee can go on Workmen's Compensation as he must have met the criteria for that benefit to qualify for injury-on-duty leave with pay.

71. See above for comparison with other sectors in respect to sick-leave provisions.

72. House of Commons Debates, 28 June, 1982, p. 18879.

73. Bill C-133, an Act to amend the Supplementary Retirement Benefits Act (No. 2) enacted January 31, 1983.

74. A pre-employment chest X-ray is a requirement throughout the federal public service.

75. Subsec. 82.1(1) of the Canada Labour Code, R.S.C. 1970, c. L-1, as amended by S.C. 1978, c. 27, s. 28, gives any employee under its jurisdiction the right to refuse work where

> . . . he has reasonable cause to believe that
> (*a*) the use or operation of a machine, device or thing would constitute an imminent danger to the safety or health of himself or another employee, or
> (*b*) a condition exists in any place that would constitute an imminent danger to his own safety or health. . . .

Similar provisions now exist in recently enacted health-and-safety legislation in some of the provinces. There is no such provision in the PSSRA. As we saw in Chapter 5, p. 226, above, an agreement on withdrawal from work in the event of imminent danger has been endorsed in the NJC.

76. The priority given to health-and-safety issues in the last round of negotiations reflects CUPW's long-expressed concern over the significantly higher rate of injuries on the job in the Post Office than in other parts of the public service. CUPW spokesmen attribute injuries such as burns, cuts, sprains, strains, hernias, broken bones and skin irritations to a variety of factory-like working conditions peculiar to the Post Office. These conditions include, among others, the use of automated equipment, including vehicles, and the handling of heavy parcels.

8: *Wage Developments and Related Issues*

Atypical settlements have been made, often after the threat or use of a strike, for a number of high-profile groups in the public sector, federal, provincial and municipal. These settlements have reinforced a popular perception that wage increases in the public sector are out of control, and that collective bargaining is the cause, particularly when accompanied by the right to strike. Public concern over negotiated increases in the public sector and their potential impact on the level of taxation, as well as their potential inflationary impact (through 'spill-over' or pattern-setting effects) creates pressure on the policy makers, some of whom have themselves expressed similar concerns. While a detailed analysis of wage developments is beyond the scope of this study, we propose to look briefly at the results of some recent economic research on the subject. Objective statistics can be instructive in distinguishing myth from reality.

Although it is difficult, if not impossible, to separate the impact of collective bargaining from the other variables in the wage-determination process, there is some evidence that collective bargaining has been important in raising wages in the public sector, notably in the initial stages of bargaining and for lower wage groups where 'catch-up' has been a particular factor.[1] This compares with the experience in the private sector whenever collective bargaining was first introduced. Nor is there doubt that public sector wages have continued to rise substantially, even after the first catch-up settlements were made. However, the basic questions for the purpose of this discussion are not whether wages in the public sector have been rising — as clearly they have been — but whether, as is popularly believed, they have been rising at a significantly higher rate than wages in the private sector, and what subsectors within the public sector have been responsible for the highest overall increases. In addition, of course, we must consider comparative levels of remuneration, for percentage increases alone tell an incomplete story.

Trends in Compensation: Some Intersectoral Comparisons

It is hardly surprising that the various studies of comparative compensation trends[2] would produce slightly different statistical results, given the different research methodologies and, in particular, the different data bases on which they have been carried out,[3] as well as the different forms in which the results have been presented. Some studies show increases by year, some show average annual increases over a period of several years, and some show total increase over a period of years. The findings of some of these studies are shown in Tables 10 to 13. Far more significant than any differences in their results, however, is the consensus that emerges from the different studies with respect to general trends.

None of the serious comparative research on wage developments in the private and public sectors bears out the popular perception, shared by the policy makers in a number of jurisdictions, that overall negotiated increases in the public sector have significantly outpaced those in the private sector, either in the decade prior to the imposition of wage and price controls in 1975 (the period on which most of the research has been based)[4] or in the years that have followed. Tables 10, 11 and 12 show that annual percentage base-rate increases for settlements in the public sector, broadly defined, have generally been on line with, or even slightly lower than, increases in the private sector.[5]

All the evidence indicates that the rate of increase for the public sector as a whole was highest in 1975, the year the controls program was introduced. Some researchers found a marked public sector advantage in that year, with base-rate increases approximately 4 per cent higher than in the private sector (Tables 10 and 11).[6] However, a careful examination of the figures shows that whatever public sector advantage there may have been was the result of exceptionally high settlements in the provincial and local public services. This finding applies also in the parapublic sector, which includes services in health, welfare and education. The federal increase in 1975 was, in fact, significantly lower than the increase for the public sector as a whole and, according to the different studies, either identical to, or slightly below, the increase in the private sector. The figures for 1975, in particular, but also for the overall period covered in the various studies, illustrate the importance of distinguishing among the various components of the public sector in comparing compensation trends.

One fact that emerges when these distinctions are observed is the volatile nature of the settlements made at the provincial and local levels, including those for the health, welfare and education services; unusually high settlements in particular years tend to be dissipated over time. This was pointed out by one author, whose figures have been updated to 1979, and who postulates, on the basis of his calculations, that there may be some basic factors at work to restore equilibrium between private and public sectors when these get out of line.[7] This hypothesis is supported by more recent statistics. The *Nineteenth Annual Review of the Economic Council of Canada*, released 30 September 1982, shows that the levelling-out process has continued. The Council's figures indicate that negotiated wage gains in the provincial and parapublic services, as well as in the federal public service, lagged marginally behind those in the private sector in 1980 and 1981.[8] Another study suggests that the public sector may not be as unresponsive to market forces as some other scholars would believe.[9]

Of particular interest in the context of this study is the finding, on which there is general agreement, that the rate of base-wage increases in public sector settlements, taken as a general rule and averaged over a period of years, has been inversely related to the level of government. The smallest relative increases have occurred at the federal level, and the largest, including those related to health, welfare and education, at the provincial and local levels. More often than not, according to all the studies, the annual rate of increase in base wages has been less at the federal level than for the public sector as a whole, and less than for the private sector.

This was true even in the initial period of collective bargaining in the federal public service when catch-up with the unionized sector must have been a significant factor, particularly for workers in the lower-wage categories. However, deviations from the general pattern have occurred in particular years. For example, in 1976 and 1977, the federal increases exceeded the rate of increase both for the public sector as a whole and for the private sector (Table 11). This is rather ironic as these were the first years of the Anti-Inflation Board (AIB) program. The higher increases in the federal service in the early period of wage controls probably reflect a catch-up factor, as wage restraints in the early to middle 1970s appear to have left employees of the federal government behind employees in other sectors, with whom their wages had traditionally been compared.[10] The lag in wages at the federal level, relative to the other sectors, before AIB was imposed, may be explained by the federal government's determination to 'hold the line', in accord with anti-inflation 'guidelines' that were in effect at the time, but which, since they were 'voluntary', had clearly not had their intended effect in the other sectors.

Some Caveats with Respect to Base-Rate Trends

The use of base-rate trends for comparative purposes has been justified by researchers on a number of grounds, apart from the fact that they are the figures most easily available, most often used by the press, and consequently most often seen by the public. For one thing, the base rates cover a higher proportion of workers than do other measures. This is because the distribution of employment on the basis of wages tends, on the whole, to be pyramidal, with the largest numbers appearing in the low-wage categories. Base-rate trends also have some advantage in that they function as a control for changes in occupational composition over a period of time; in other words, by observing base-rate trends we may be sure that we are always comparing similar things.

Base-rate trends, on the other hand, also conceal a number of important factors. They fail, for example, to take account of the phenomenon of 'classification creep', which has been an important factor, particularly in the larger jurisdictions, in increasing individual incomes at the lower levels, through promotion and reclassification, for example. This phenomenon, along with other aspects of wage drift, such as overtime pay, can increase the total wage bill of the employer without showing a corresponding increase in base-wage rates.

Base-rate trends also fail to take account of exceptional increases for particular groups[11] and of differences in compensation trends both among and within occupational classifications.[12] They completely ignore developments in professional and upper bargaining-unit salaries, although these developments, which will be discussed below, raise some basic compensation issues.[13] It has been suggested in one study[14] that a comparison of average income increases rather than base-rate increases might reflect overall trends more accurately, even though these comparative data fail to distinguish between the unionized and non-unionized subsectors within the public sector. The study shows that the average annual income increase (for unionized and non-unionized employees combined) was approximately 10 per cent at all three levels of government over the 1967–1975 period. This compares with base-rate increases of approximately 11 per cent at the provincial and local levels and 8 per cent at the federal level. The average increase clearly is considerably out of line with the base rate increase at the federal level.

It is suggested that wage drift (including, for example, reclassification, promotion and overtime pay) might be one explanation for the disparity between average and base-rate increases at the federal level. Other possible explanations offered are, first, the possibility of substantially higher increases in the non-unionized than in the unionized portions of the federal public service or, secondly, a tendency toward increased employment in the professional occupations during this period.[15]

To the extent that base-rate statistics conceal the importance of differences in occupational distribution and the significance of distribution in levels within occupations, in the sectors being compared, and take no account of the pattern of consistently higher increases that has developed for particular groups, some caution must be exercised in interpreting their significance.

Levels of Compensation: Private and Public Sectors Compared

Research on wage comparisons has produced some evidence of a distinct, though possibly shrinking, wage advantage in the public sector, particularly for female employees and in the lower-level occupations; in contrast, the upper occupational levels have been found, on the whole, to be less than competitive with the private sector.[16] However, a recent study that compares hourly rates for jobs in different parts of the public sector with carefully matched jobs in the private sector indicates that the public sector wage advantage, where it exists, is confined largely to the lower levels of government.[17] The study, prepared for the Conference Board in Canada on the basis of mid-1978 statistics, has produced some of the most interesting evidence to date on private-public wage differentials. By focusing on job comparisons at a given point in time and on a highly disaggregated level, the study has attempted to avoid distortions arising from other methods — and in large measure it appears to have succeeded.[18] Accordingly it may be useful to examine its findings in some detail.

The study distinguishes among the different levels of government, as well as among various quasi-governmental agencies in the public sector, for purposes of comparison with the private sector. Eleven occupations were investigated, and comparative data were collected for various levels of experience and responsibility, from the entry, through the junior level, to the more senior level.[19] Over all, almost fifty jobs were studied and compared and, as the authors point out:[20]

> ...since the occupations chosen are reflective of a much broader spectrum of jobs within the same category or family of jobs having similar degrees of difficulty, it is felt that the comparisons shown apply to a significantly large part of all office support, technical and professional classes in the various sectors compared.

The findings confirm the importance of distinguishing among various levels of government to identify meaningful comparisons of compensation. The need to distinguish among various levels of government was also noted in the preceding section in relation to comparisons of compensation trends:[21]

> ...findings concerning the relative levels of compensation in one segment of the public sector cannot be generalized to the others. . . . Even within a single public sector, one cannot often state that the public employer generally pays more or less than the average for the private sector, since the relative level of compensation often varies by occupation and level within the occupation.

As shown in Table 14, below, the study found that the provincial government-enterprise sector, which consists mainly of regulated industries, such as hydro-electric and telephone companies, and the municipal government sector were the only public sectors in which mean hourly rates of pay were consistently higher than those for comparable jobs in the private sector; in several instances the difference was over 20 per cent, and it was occasionally higher than 30 per cent. For provincial governments the results were uneven, with hourly wages somewhat lower for some of the matched jobs and somewhat higher for others. Federal government enterprises, which comprise organizations clearly associated with federal government responsibilities, such as Atomic Energy Ltd. and the Bank of Canada, or which pertain to industries conducted by a few large and highly regulated firms, such as Air Canada and Canadian National Railways (CN), were found to pay the same hourly rates as the private sector in over half the positions compared. Some of the remaining positions were found to be ahead, others behind.

The compensation comparisons between the federal government, consisting entirely of Treasury Board employees, and the private sector are of greatest interest in the context of the present study (see Table 15). While the hourly rates of pay were found[22] to be "at least competitive with those in the private sector at the entrance level positions", they tended to "trail the private sector at the more senior positions." Over all, the study found "no substantive evidence that suggests rates of pay in the federal government consistently exceed the rates of pay for comparable jobs in the private sector [as of mid-1978]." In fact:[23]

> With the exception of certain jobs at the entrance or junior levels, especially within the professional and technical categories, the maximum hourly rates of pay in the federal government are approximately the same as, and in some cases less than, the average pay rates in the private sector.

However, there are implications for the total wage bill in the finding,[24] as shown in Table 16, that "The federal government appears to employ a larger percentage of its workers at the more senior and hence higher paying levels than does the private sector." As the authors note:[25]

> ...the effect of this difference would tend to result in a relatively higher employment-weighted average pay rate for occupations in the federal government compared to the private sector despite the fact that no apparent differences exist at each of the various job levels within an occupation.

The Question of Fringe Benefits

In spite of the importance of fringe benefits as a proportion of total pay-roll costs and the debate at the federal level on the question of aggregate compensation comparability,[26] none of the studies discussed above has incorporated benefit costs in its comparative figures. However, the Conference Board study dealt separately with fringe benefits and justified their exclusion. It found that benefit costs, though slightly higher in the public sector than in the private sector, were not sufficient to affect materially the conclusions on earnings comparisons.[27] This conclusion is supported by one estimate that the relative importance of fringe benefits in the private and public sectors may now be roughly comparable.[28]

The Public Sector Compensation Restraint Act

As we noted in earlier chapters, negotiations over wages and other aspects of the compensation package have been suspended in the federal public service for a period of from two to three years on the basis of the Public Sector Compensation Restraint Act (PSCRA). Wage increases will be limited to the ceilings that that Act imposes for the period during which it is in effect. The Act provides for other aspects of the compensation package to be frozen at their present levels. In addition to suspending negotiations for the renewal of agreements, the PSCRA rolls back any increases under existing agreements that exceed the allowable limit. This provision stands in contrast to the anti-inflation legislation of 1975, which neither prohibited negotiations for new or renewed agreements nor interfered with provisions of existing agreements.

The PSCRA was enacted as part of the government's program to control inflation. In his speech in the House of Commons on 28 June 1982, introducing budgetary measures to bring down inflation, the Honourable Allan J. MacEachen, then Minister of Finance, said:[29]

> The private sector and the provinces could not be expected to accept income restraint unless the Government of Canada showed leadership in the conduct of its own affairs. The government has therefore decided to lead the way by implementing the proposed strategy in the federal public sector for a period of two years.

The PSCRA, commonly known as 'Bill C-124', was the legislative instrument directed to this end. This Act covers, among other groups, all portions of the public service to which the PSSRA applies. Departments and ministries of state of the Government of Canada and other portions of the public service to which the PSSRA applies are listed, among other entities, in Schedule I of the PSCRA. As we saw earlier,[30] the Canada Post Corporation Act brought postal negotiations under the jurisdiction of the Canada Labour Code. However, the removal of the Post Office from the jurisdiction of the PSSRA does not exempt the postal unions from the provisions of the PSCRA.[31]

In defending the proposed wage-restraint legislation in the course of the Budget Debate, the Honourable Donald J. Jonnston, then President of the Treasury Board, recognized that wage increases in the federal public service had not actually been out of line. Like Mr. MacEachen, Mr. Johnston noted that a major purpose of the legislation was to set a pattern of restraint for other sectors:[32]

> ...we do not like singling out government employees whose pay increases have not been noticeably out of line. . . . But leadership must begin at home.
>
> ...It must begin here by those employees who are affected by our own legislation and by our own benefit programs. We are hoping to see the five-six rule and objective which we are introducing adopted by other sectors, by other governments, by other businesses and by the private sector.

The 'Six-and-Five' Formula

Under subsection 8(1) of the PSCRA, any provision of a compensation plan[33] for employees governed by this Act that provides for an increase in wage rates for the employees, beginning on or after 29 June 1982, is declared to be of no effect. However, if the parties agreed in writing, before 29 June 1982, to establish a compensation plan that would take effect on the expiration of a previous compensation plan — that is, if they came to terms during the negotiations for the renewal of an agreement, and if the plan, as agreed on, was put into effect after 28 June 1982 — the foregoing provision does not apply.[34] In other words, an increase in wage rates provided for in a tentative agreement signed by the parties and subsequently implemented is to be honoured, as far as the first increase under the agreement is concerned, as part of a transitional arrangement.[35] The same principle applies, on the basis of subsection 8(3), for the first increase in wage rates for employees effective on or after 29 June 1982 if the increase, calculated on an annual basis, does not, in the opinion of the Treasury Board, exceed 6 per cent. The term 'compensation' is defined in subsection 2(1) as "all forms of pay, benefits and perquisites paid or provided, directly or indirectly, by or on behalf of an employer to or for the benefit of an employee." The term 'wage rates' is defined as "single rates of pay or ranges of rates of pay, including cost-of-living adjustments, or, where no such rates or ranges of rates exist, any fixed or ascertainable amounts of pay." In substitution for any increase in wage rates called for under a collective agreement or arbitral award that the PSCRA has declared to be of no effect, the following pattern of increases has been established by section 9 of that Act: in the first twelve-month period, an increase of 6 per cent, and for the second twelve-month period an increase of 5 per cent. The first twelve-month period is to be calculated as of "the day immediately prior to the day on which the first increase in wage rates on or after June 29, 1982 would, but for section 8, occur under the compensation plan."[36]

Special provision is made for the situation where a collective agreement or arbitral award expired before 29 June 1982, and no new collective agreement had been entered into or arbitral award made before that date. In such circumstances the compensation plan is extended, by subsection 5(1) of the PSCRA as follows:

> (*a*) where the compensation plan would have expired on or after June 29, 1981, for the twelve month period immediately following the day the plan would have expired; or
> (*b*) where the compensation plan would have expired before June 29, 1981, until June 29, 1982.

In the situations where subsection 5(1) applies, section 10 of the Act provides that the increase in wage rates in the first twelve-month period may be not more than 9 per cent. The explanation for this provision, offered by the President of the Treasury Board to the Miscellaneous Estimates Committee, was:[37]

> ...that such groups will be the beneficiaries of a transitional provision which would get them up to 9 per cent for the year in respect of which they are negotiating a contract, and they will then go under the program of 6 and 5 at the expiration of that year.

> ...It was felt that to have a fair transitional period they should be entitled to receive what other groups basically were receiving during that period in the range of 9 per cent.

Under section 6, the amount of the increase rests in the discretion of the Treasury Board, which that section empowers to authorize, or to agree to, an increase in wage rates of not more than 9 per cent. In addition subsection 13(*a*) empowers the Governor in Council, on the recommendation of the Treasury Board, to substitute a different percentage for the 5 per cent limit set by section 9 for the second twelve-month period; the Governor in Council may make such a substitution "where he considers it to be in the public interest to do so on grounds of labour shortages".

In a news release dated 29 July 1982, the Honourable Donald Johnston, then President of the Treasury Board, stated that an amendment to the original Bill, incorporated as section 16 of the PSCRA, would permit the parties to negotiate a combination of wages and other improvements, provided the total package respects the 'six-and-five' limits imposed by the Act. Section 16 states that: "The Governor in Council may, by order, terminate the application of this Act in respect of an employee or a group of employees to which this Act applies." Mr. Johnston stated in part:

> It is important that the parties have as much leeway as possible within the limits of the legislation to work out their own arrangements. For that reason the wording of the amendment has been made deliberately simple to allow for a variety of arrangements. If the parties voluntarily agree to use, say, one-half of one percent of the 6 percent allowable wage rate increase to introduce a paid maternity leave provision in their agreement, and the remaining 5.5 percent to adjust wage rates, and divide up the second year's 5 percent in a somewhat similar way, then they will be found to be in keeping with the spirit and intent of the legislation. Once the Governor in Council is satisfied that their compensation plan for the two years of application of the restraint program is in keeping with the limits of the legislation, it would be allowed to terminate the application of the legislation for that group of employees.

The wording of section 16 of the PSCRA suggests the possibility of exempting a group of employees from the Act as a whole. It is clear from Mr. Johnston's statement, however, that it is not the government's intention to restore to any group, during the restraint period, the rights they previously enjoyed under the PSSRA. According to Mr. Johnston's statement, section 16 will be applied only where an understanding has been reached to amend an agreement in a way that conforms, overall, to the 'six-and-five' formula, and that extends the termination date of such agreement to coincide with the end of the restraint period. In the result, the principles of the PSCRA would be preserved, but in the guise of a collective agreement.

By early January 1983, two units, the home economics and historical research units, had made a trade-off in respect of maternity leave as suggested by Mr. Johnston. Both units are represented by the Professional Institute of the Public Service (PIPS). The population (forty-four) of the home economics unit is exclusively female; seventy-three (26.3 per cent) of the 278 members of the historical research unit are women. The estimated cost of the maternity-leave package, based on figures supplied to PIPS by Treasury Board, reduced the first year's salary increase of 6 per cent, fixed by the PSCRA, by .4 per cent for the home economics unit and by .1 per cent for the historical research unit. The 5 per cent increase for the second year was left unchanged for both units. In return for accepting these slightly lower wage increases in the first year, employees in these units will be eligible, under their amended agreement, for 17 weeks' maternity leave at 93 per cent of their regular salary, on the pattern first established in the CUPW agreement and discussed in Chapter 7, above.

One may entertain doubts about the extent to which the sort of trade-off suggested by Mr. Johnston, and adopted in the instances cited above, is likely to occur. The consequence would be a loss in compensation for many employees in the bargaining unit concerned, at a time when increases already negotiated and agreed upon have been 'rolled back'. The Public Service Alliance of Canada (PSAC) has advised all bargaining units it represents that it will not be party to any arrangement of this nature. Although PIPS has left its occupational groups free to make their own decision, the President of PIPS described the home economics and historical research settlements as a "travesty".[38]

It is hardly surprising that the bargaining agents have not taken kindly to the restrictions imposed by the PSCRA. As we saw in Chapter 6, above, several bargaining agents have filed complaints with the ILO, alleging that the PSCRA violates a number of conventions of that international organization. The PSAC has also instituted proceedings in the Federal Court of Appeal seeking a declaration that the Act was invalid. As of the time of writing, the matter has not yet been dealt with by the

Court. In addition the PSAC, in its weekly newsletter, urged employees in the clerical and regulatory unit to present grievances complaining of the denial of wage increases provided for in their collective agreement, but denied them because the increases exceeded the limits fixed by the PSCRA. Over 8000 employees followed this suggestion. Before any of these grievances had reached the stage of adjudication, the employer sought relief from the action of the employees by applying to the PSSRB under section 18 of the PSSRA. In its application the employer alleged that the PSAC was "abusing the grievance procedure and such action could prohibit genuine grievances from being fairly and timely dealt with." The remedy it sought was that the Board call on the PSAC "to take whatever steps [were] necessary to cancel the advice urging employees of the CR unit to file such grievances and to allow the Applicant to ignore such grievances." The Board dismissed the application, holding that it had no jurisdiction under section 18 of the PSSRA to grant the relief requested.[39] In its decision, the Board noted that there had been no failure on the part of the PSAC "to comply with, or to properly implement, a provision of the Act", and the complaint of the PSAC "did not encourage the employees concerned to violate a provision of the Act" since the "employees who grieved the wage rollback were entitled to do so by the provisions of section 90 of the Act." The Board's decision did not indicate in any way the possibility of success by any aggrieved employee on the merits of his grievance when it came to adjudication.

Compensation Issues in the Federal Public Service

The following discussion of compensation issues is based on the situation prevailing before the enactment of the PSCRA. It is to be hoped that we shall return to this situation after the period mentioned in that Act.

External Comparisons

Some compensation issues in the federal public service, such as the appropriate universe for pay comparisons and the question of total compensation comparability, have given rise to serious differences between the parties. Although these and other compensation issues have been placed 'on hold', for all practical purposes, during the current suspension of wage negotiations, they will undoubtedly resurface when the situation returns to normal. We have dealt briefly with the comparability issue in discussing negotiating procedures[40] and shall consider it in somewhat greater detail in the section on arbitration.[41]

Another compensation issue, the geographic basis for the determination of wages and salaries, has been resolved, on the whole, in favour of national scales of rates. However, a few units, some of them involving substantial numbers, are paid on a local or regional basis.[42] The general labour and trades and general services units are the largest to which regional or local rates apply. Rates of pay are established for each class in these units in twenty-two pay zones which together cover the whole of Canada. While the zone rates, expressed as single hourly rates, are intended to maintain a level of remuneration comparable to that of the local labour market, they are not necessarily different for each pay zone. As pointed out by the Pay Research Bureau (PRB)[43] and confirmed in our own analysis of more recent collective agreements, a number of zones could, and frequently do, have the same hourly rate for a single job.

Somewhat different systems apply to the other units. For some the plan of compensation is based on a number of regions; each of these, as noted in the PRB study mentioned above, corresponds to a province or to a group of provinces and territories. There are eight compensation plans for the nursing unit and seven each for the education and educational support units. There are seven plans each for the hospital services and physical and occupational therapy units; this last unit, incidentally, is the most recent to have adopted a system of regional rates. The plan for ships' officers and the plan for ships' crews divide the country into two regions: east and west. The ship-repair units, as we noted earlier, negotiate separately on the east and west coasts and, accordingly, have separate rates of pay. The hospital technicians' sub-group of the engineering and scientific support unit has separate rates for both Montreal and British Columbia and a single rate for the rest of the country. Finally, there is a somewhat more complex plan for the printing-operations unit. This plan identifies different pay zones for each sub-group; some of these zones correspond to a city or to cities, others to a province or to a group of provinces.

The general labour and trades and the general services units[44] were paid on a locally comparative basis before collective bargaining was adopted; so, too, were the ships' officers and crews on the east and west coasts.[45] For units such as these and a few others,[46] payment on a system of local or regional rates represents a continuation of traditional practice. For some other units, however, regional rates are a more recent phenomenon.[47] The introduction of a system of regional rates for units previously on national rates appears to have been sparked, in most instances, by the employer's concern with staff recruitment and retention in high-wage areas and its unwillingness to incorporate the highest regional rate into a national pay structure, because of the cost and pattern-setting implications that would be involved.[48] The bargaining agents, on the other hand, see any departure from national pay scales as a violation of the union principle of 'equal pay for equal work'. Accordingly they have generally objected to suggestions to switch to regional rates in particular instances and have even tried, albeit unsuccessfully, to have regional rates eliminated for some units to which they currently apply.

Although switches from a system of national rates to one of regional rates have been relatively few and have occurred only where significant geographic differences in outside rates of pay could be demonstrated, there have been some adjustments to meet particular circumstances, short of adopting regional rates *per se*. The physical sciences agreement, for example, takes account of the problem of recruitment and, more particularly, retention[49] of oil and gas geologists and engineers. These groups have been in short supply because of an unusually high demand for their services in the private sector, notably in high-wage oil-producing provinces. Accordingly the problem has regional connotations. Recognizing the fact that the short supply could be temporary, the agreement provides, by letter of understanding, for a special terminable allowance, in addition to their regular salary scale, for employees in this particular group. The letter specifies the positions to which the special allowance is to apply, the rate payable at each level within these positions and the method for calculating the amount payable to incumbents of these positions in particular circumstances. It states clearly that the allowance, which is payable in semi-annual instalments, does not form part of an employee's salary. Finally, there is a provision for consultation and, if the employee wishes, grievance procedure, up to and including adjudication, in any dispute arising from the application of the letter.

The problem of retaining employees with skills that are scarce, and are therefore compensated at a significantly higher level on the outside market, has sometimes been met by raising the classification level of an incumbent to a point that will induce him to remain in the public service. However, as one observer noted, this method can create distortions in relative rates of pay between those employees with lower qualifications and less experience, who have been reclassified to meet the retention problem, and others who possess higher qualifications and broad experience in specific skills. The ramifications, in fact, are even wider, in that the system normally used to determine the scales of rates of pay includes correlation among occupational groups, in line with the policy of maintaining internal relativities. The arbitrary upward reclassification of some employees in one group creates pressures for upward revision of all members within that occupational group, without considering the impact on other occupational groups. It has been suggested that the parties to collective bargaining could address the problem more realistically by negotiating *either* special temporary subclassifications or an annual bonus to reflect fluctuating market conditions. This arrangement was made for the oil and gas geologists. Their special terminable allowance avoids permanent distortion in relative rates of pay.

Regional adjustments to meet staffing problems have also been made by the Northern Canada Power Commission, which, unlike most other parts of the public service, is concentrated in a single geographic area. The Commission's rates of pay, as a Treasury Board official remarked, "reflect the facts of life". In other words, these pay rates are realistically related to the problem of recruitment and retention in the high-wage area in which the Commission's operations are located. Accordingly the pay scales for employees of this separate employer are related to wages being paid by other public utilities in the area rather than to general public service rates. This scale has been adopted, even though federal public employees who are members of the same occupational groups and perform similar work in the same area, but who are part of national bargaining units, are paid on the basis of a national rate. In other respects, however, such as isolation-pay allowance, the rate for employees of the Northern Canada Power Commission is the same as for the public service as a whole.

The problem of recruitment and retention was not ignored by the policy makers when they drafted the PSCRA. As we saw earlier in this chapter,[50] section 13(*a*) provides for the modification of the allowable increase, in the second year of the application of that Act, where it is "in the public interest to do so on grounds of labour shortages."

Internal Relativities

Given the fact that the government's wage policy, before the enactment of the PSCRA, was based primarily on outside comparisons for both national and regional rates, and that developments in the outside labour market have brought higher increases for some groups than for others, and given also the differences in bargaining power among different occupational groups within the public service, it goes almost without saying that developments in negotiated rates of pay would differ among groups, to some extent at least. Even where percentage increases have been the same, as happened often in the earliest rounds of bargaining, the effect has been different for higher- and lower-paid occupational groups, and has, in fact, widened the gap between them. In some cases a system of percentage increases has also enlarged disparities among various levels in a single bargaining unit.[51]

Invidious comparisons, based on uneven bargaining results, have understandably increased the tension in certain bargaining situations. This happens particularly when a group finds that its pay scale has lagged behind that of another group in which the same or similar work is being performed. The issue, however, is not new, nor is it confined to the public service.

In recent years two basic compensation issues have come to the fore in the federal public service. One of these involves the declining position of managerial salaries relative to bargaining-unit wages, a matter on which some concern is also being expressed in the United States.[52] The other stems from complaints under human rights legislation. Both could have significant policy implications.

The Compression — Inversion Phenomenon

Salary scales in the federal public service are based on a hierarchical classification system through which an individual may be expected to progress through a combination of seniority and promotion. Each class or grade within a group has a salary range; the maximum salary at each level of that range often overlaps the minimum salary at the next level. An examination of salary scales shows that salaries negotiated for the penultimate and ultimate levels of bargaining units, particularly in the scientific and professional, and the administrative and foreign service categories, may equal or even surpass the pay of persons in the same occupational group, who are excluded from collective bargaining because they perform managerial functions. In fact salaries paid at the highest and next-to-highest levels of bargaining-unit employees may sometimes be even higher than salaries paid in the lower levels of the executive category (SX 1 and SX 2).[53] As salary increases for managerial exclusions are set unilaterally by Treasury Board, they have tended to reflect the government's policy of fiscal restraint, particularly in recent years.[54] The result, in some cases, has been the so-called 'compression-inversion' phenomenon, described as follows in the employer's submission in the *Computer Systems Case*:[55]

> ...as negotiated or arbitrated rates of pay crowd upon excluded rates in the Group and rates in senior public service levels that are not subject to collective bargaining, with the result that historical differentials are compressed, . . . in some instances there may be an "inversion" whereby a person in a subordinate position may receive a rate of pay in excess of that received by a person in a more senior position.

Concern over the declining position of managerial salaries relative to salaries at the upper level of bargaining units[56] (as well as the declining position of the former group of salaries relative to those for comparable positions in the private sector) appears to have been one factor, at least, in the federal government's decision to establish a separate management category.[57] In the news release[58] announcing the decision to establish the new category, the President of the Treasury Board noted that restrictions on the level of senior salaries over the previous five years had virtually eliminated differences between salaries of employees at the bottom of the senior executive (SX) category and those of many members of the groups they supervised. One of the objectives — and a clearly stated one — in establishing the management category, was to ensure that managers would be paid more than their immediate subordinates who are subject to collective bargaining. To this end, the official compensation policy was to provide "for aggregate compensation comparability between the federal Public Service and the average salary provided by the private sector for all management levels up to and including the lowest level of the Executive group."[59]

It should be noted, however, that this policy was not intended to apply at the levels of the more senior executives and deputy ministers:[60] "A policy of internal relativities, with appropriate salary differentials between successive executive and deputy minister salary ranges, with the upper limits of the ranges being set by the government . . . will continue as at present." Salary increases at all levels of management are subject to the same ceilings as those for bargaining-unit employees for the period that the PSCRA remains in effect. Employees in the management category and at the more senior executive levels will also be particularly affected by subsection 6(5) of the Act. According to this provision, an employee loses his entitlement to merit increases, incremental increases or performance awards if the maximum of his salary range, as of 29 June 1982, equals or exceeds $49 500 annually.

Human Rights Legislation: Impact on Compensation Policy

A relatively new compensation issue, but one with potentially far-reaching implications, arises out of subsection 11(1) of the Canadian Human Rights Act.[61] This provides that "It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees in the same establishment who are performing work of equal value."

A number of complaints of discriminatory practice in the federal public service have been raised under subsection 11(1) and, after investigation by the Human Rights Commission, have been resolved in favour of the complainants. A few complaints have been rejected. Several cases were under consideration at the time of writing.

As might be expected, all complaints made to date under the equal pay provision have alleged discriminatory practices against women. Allegations of discrimination have been made, for the most part, by bargaining agents, on behalf of predominantly female *groups*, that is, bargaining units comprised principally or entirely of women. However, one complaint by an individual, a non-bargaining-unit employee, is of particular interest for the principle it established and the pattern it set for other employees in the same position. The complaint in question was raised by the Director of Nursing at the Veterans' Hospital at Ste-Anne de Bellevue, Quebec. The Director alleged that she was being paid less than the other hospital directors simply because she was a woman, although the responsibilities of her job were equal to those of the male directors. Accordingly she claimed her right, under the Canadian Human Rights Act, to equal pay for "work of equal value." Following intervention by the Commission, late in 1980, Treasury Board agreed to give her parity with the male directors. It also revised the director-of-nursing positions at other D.V.A. hospitals to eliminate similar discriminatory practices.

The first equal pay settlement on behalf of a bargaining unit was made in February 1980. It resulted from a complaint by PIPS on behalf of female nurses employed in the Penitentiary Service. The complaint alleged that female nurses in the Dorchester and Springfield Penitentiaries were paid less than male technicians with whom they worked side by side and who performed virtually identical tasks. The male technicians were in a different occupational group, the hospital-technician sub-group of the engineering and scientific support unit, and they were represented by a different bargaining agent, PSAC. Following a recommendation of the Human Rights Commission, the nurses' rates were raised to the level of pay of the male technicians. The equalization adjustment included a provision for retroactivity. This settlement was followed by similar settlements for nurses in the Canadian Penitentiary Service in Saskatchewan and Montreal who, like the nurses in the Atlantic region, complained of pay discrimination on the basis of sex in comparison with health-care officers. The latter group consisted primarily of males who, it was alleged, were actually charged with fewer responsibilities than the nurses. Both the hospital technicians and the nurses, as noted above, are paid at regional rates; for this reason the three cases were dealt with separately.

The first complaint made under section 11 of the Canadian Human Rights Act that involved an inter-unit comparison of employees doing *dissimilar* work was settled in favour of the complainants, at the end of 1980. The settlement followed the ruling of the Human Rights Commission that the library-science unit, 63.5 per cent of whom were women, performed "work of equal value" to that of the historical research unit, 75.9 per cent of whom were male. PSAC had filed the complaint on behalf of the librarians in February 1979, alleging that the work they performed was of equal value with that of the predominantly male-dominated historical research unit, represented by PIPS. The complainant claimed that the librarians' rate of pay, which was substantially lower than that of the latter group — $3600 difference in mean annual rates — demonstrated sex discrimination. The investigation was one of the most complex undertaken by the Commission as it involved the analysis of more than fifty-six positions in the two units. It resulted in the largest single financial settlement arising out of a complaint of pay discrimination to that date.[62] Retroactive pay to March 1978, a year earlier than the complaint was filed, totalled more than $2 million dollars, with individual awards ranging from $500 for librarians in the highest classification to $6300 for librarians in the lowest classification. Salary increases ranged between $500 and $2500 a year.

The majority of library-science and historical research employees work at the National Library and the National Archives in Ottawa, but workers in these units are also employed in most other federal government departments across Canada. The salary increase and retroactive pay awarded under section 11 of the Canadian Human Rights Act were put into effect for all librarians employed by Treasury Board. These librarians are, after all, members of a single bargaining unit, represented by a single bargaining agent, and have always been paid on the basis of national rates. There could be no question that they were employed in the "same establishment", according to the meaning of section 11 of the Act. An interesting point arose, however, when the government refused to extend the settlement for the library-science unit to librarians at the National Research Council (NRC), a 'separate employer'. The government argued that the NRC librarians are not employed in the "same establishment" (or even by the same employer) as the librarians employed by Treasury Board, and that the former group had not therefore suffered discrimination on the basis of sex. PIPS, which represents the NRC librarians, took the case to the Human Rights Commission. No hearings were held on the case as negotiations for a new agreement were in progress at the time the complaint was filed. An agreement reached at the conciliation-board stage provided for an 'equalization adjustment' in addition to a percentage increase.[63] The equalization adjustment, which at some levels amounted to approximately $3000 over the period of the new agreement, re-established the 'historical relationship' between the salaries of NRC librarians and the salaries of librarians employed by Treasury Board; the pay scales of the former group have traditionally been compared with the pay scales of the latter. However, there was no provision in the agreement for the retroactive pay PIPS was claiming as compensation for alleged discrimination. An appeal to the Commission on this issue was dismissed in December 1981.

The case of the librarians raises a question relating to the status of the separate employers: How separate is separate? Or, to put it differently, are the separate employers more separate, in the eyes of the government, for some aspects of remuneration than for others?

Andrew Stewart, then president of PSAC, called the library-science settlement with Treasury Board a "precedent-setting case" and "a major victory in the fight for equal pay for work of equal value." Just a few months later, the Alliance and Treasury Board reached agreement on an equal pay increase for a preponderantly female group, marking the first time that the principle of equal pay for work of equal value has been implemented through collective bargaining, that is, without the intervention of the Human Rights Commission. The settlement resulted in pay increases for 341 hospital technicians, mostly women, and brought their pay into line with that of more than 6000 men performing "work of equal value". Both sets of employees are in the same bargaining unit, that is, the engineering and scientific support unit, but the employees have traditionally been split into sub-groups for pay purposes. This practice is no longer acceptable under section 11 of the Canadian Human Rights Act.

In a news release dated 19 May 1981, Treasury Board announced:

> ...adjustments ranging from $181.00 to $4,460.00 will . . . be made to the rates of pay of hospital technicians, a female-dominated sub-group. Although no complaint of discrimination had been filed with the Canadian Human Rights Commission [CHRC] for this sub-group, the Treasury Board had indicated earlier [that] it would review its job classifications and eliminate any discriminatory practices without delay. These adjustments will bring the rates of pay of the female-dominated sub-group into line with those of the male-dominated sub-group. . . . The agreement was reached voluntarily by the parties following direct negotiations.

Two days later Treasury Board issued a 'clarification' which said in part:

> It was not until after Treasury Board had made the announcement that it learned about a complaint, dated March 3, 1981, filed with CHRC by the Public Service Alliance of Canada. In fact a CHRC May 14, 1981, letter reached the Office of the Secretary of the Treasury Board on May 19, in the afternoon, informing him accordingly. A copy of the complaint was attached.
>
> "The Treasury Board had approved a mandate for its officials to correct the situation well before the complaint was filed," President

> of Treasury Board, Donald Johnston said today. "We had no knowledge such a complaint even existed, for neither the Public Service Alliance nor the Canadian Human Rights Commission have advised us," he added.
>
> "As I have already indicated, we are continually reviewing job classifications to eliminate possible discrimination, without waiting for complaints to be filed with the Canadian Human Rights Commission," Mr. Johnston said.

In November 1981, a tentative agreement between Treasury Board and PSAC, on behalf of the 12 000-member general services unit, provided for a catch-up settlement for sub-groups comprising approximately 3000 workers that had suffered pay discrimination; these sub-groups were made up mostly of women. A complaint filed with the Human Rights Commission in 1979 had established that each of seven groups in the general services unit was paid on a different scale, although Treasury Board admitted to the Commission in 1980 that the work of all seven groups was of equal value. Workers in food, laundry, and miscellaneous personal services, the three worst-paid groups, were mostly women. Workers in the four best-paid groups, those of messengers, custodial services, building and stores, were mostly men. The agreement, ratified by the membership and approved by the Commission in March 1982,[64] closed the gap of up to $1.50 an hour ($3000 a year) that had previously existed between employees in preponderantly male and preponderantly female groups within the general services unit. In addition it provided retroactive compensation for employees who had previously suffered discrimination. This retroactive settlement, costing an estimated $17 million, was by far the largest up to that time.

Although it took a few years from the enactment of the Canadian Human Rights Act for the first complaints to be raised, now that the ball has begun rolling, there is no telling where it may stop. Actions under section 11 of the Act and the Commission's decisions about them have potentially widespread ramifications. Numerous questions are already being asked. What will happen, for example, to the principle of external comparison on which the government's compensation policy has traditionally been based? What will be the impact on internal relativities? Will preponderantly male units now complain that their relative position has declined? What are the implications for bargaining-unit structure? Could the Human Rights decisions bring into question the whole system of occupational bargaining units and of external comparisons for determining their remuneration? Will there be an impact on the existing classification system?

The unions are clearly taking the anti-discrimination provisions seriously. It is evident that Treasury Board has been taking them seriously, too, and is looking into inequities with a view to correcting them where possible, rather than waiting for formal complaints. The Human Rights Commission seems prepared to give Treasury Board time to eliminate inequities if it appears to be showing good faith. This, in turn, raises other questions. How much time is enough for Treasury Board or fair to the bargaining agents? How can good faith be determined? What about the question of retroactivity where a complaint of discrimination has been sustained? For how long a period of discrimination should an employee be compensated? An informal Commission guide-line seems, for the moment, to be that compensation should be retroactive to the earlier of two dates: the date on which the employer was officially made aware of the discriminatory practice or one year prior to the filing of the complaint with the Commission. More formal regulations may be expected in the future. These could have ramifications, not only in the public service, but also for other employers and employees under federal jurisdiction to whom the Canadian Human Rights Act applies. So far we may have seen just the tip of the iceberg.

The question of adjustments under section 11 of the Canadian Human Rights Act was raised when the PSCRA was being debated. Bill C-124, when first introduced, was silent on this matter. However, section 6 of the Bill was later amended in the Miscellaneous Estimates Committee to exempt the Canadian Human Rights Act from the provision of the PSCRA, which extended the terms of every collective agreement or arbitral award for the period of that Act's application. Mr. Robert Cousineau, counsel for the Treasury Board, assured the Committee[65] that, having regard to the amendment "Nothing in this legislation really affects either the freedoms contained in the Charter of Rights or any of the provisions . . . of the Canadian Human Rights Act." A wage adjustment was made on the basis of section 11 of the Canadian Human Rights Act, four months after the enactment of the PSCRA. More than 200 nursing assistants who complained of discrimination were granted annual pay increases averaging $900. Each was also granted $1300 in back pay. Treasury Board reached agreement with the

Human Rights Commission and PSAC after the nursing assistants, most of whom were women, complained that they were being paid the same as nursing orderlies, most of whom were men, although the training period for assistants is thirty-nine weeks and that for orderlies only two weeks.

Settlement Levels in the Federal Public Service: The Impact of Impasse Procedures

Some researchers have been interested in the impact of impasse procedures on settlement levels, a matter which could have significant policy implications. A 1975 study[66] concluded, concerning the area of pay, that although it is difficult to indicate precisely how arbitral awards compare with other settlements, or even with one another, such evidence as can be adduced would seem to suggest that the end result of arbitration is likely to be an award similar to those that other units have recently been granted and similar to settlements that have been arrived at through bargaining. On the other hand, a more recent study[67] covering the period between August 1974 and December 1975 declared that the evidence

> ...shows significant differences in wage settlements between Canadian Federal Public Service employees who chose the right to strike and those who chose arbitration. The results reflect the fact that Treasury Board yielded and settled for relatively high wage outcomes with employee units having the right to strike, and particularly with those who organized strikes.

The study found, in four out of the five occupational categories, that the average wage increase was higher for employees who had chosen the conciliation-strike route than for those who had opted for the arbitration route (Table 17). For two groups the differences reported were sizeable: the average annual increases in the scientific and professional and operational categories amounted respectively to 27.59 and 28.87 per cent under the conciliation-strike process, compared with 10.11 and 10.89 per cent under the arbitration option.

The Director, Research Branch, Pay Research Bureau,[68] took issue both with the limited time period on which the study just mentioned drew conclusions and with the general research methodology used. He noted that the study's measure of wage outcome (the annual increase in a unit's base rate, that is, the lowest rate weighted by the total number of employees) may not be a reliable indicator of wage outcomes as they pertain to the entire bargaining unit. The Director produced different figures for the same period, taking account of the increase at various levels in the salary scale in each bargaining unit. While his figures (Table 18) show that, in some instances, the 'collective bargaining/right-to-strike' route achieved larger increases during this period than those of the arbitration route, he found "clearly insufficient evidence to suggest a consistent trend in that direction." As the differences between the two options, on the basis of his calculations, were substantially less for all groups than those reported in the earlier study, he concluded that the "assertion of 'significant differences in wage settlements between Canadian Federal Public Service Employees who chose the right to strike and those who chose arbitration' . . . is simply not supportable."[69]

In the most comprehensive study of impasse procedures and their impact on wage outcomes covering the period 1967 – 1978, the overall average salary and wage increases embodied in all agreements and awards during that period were calculated at 7.8 per cent.[70] Agreements for units negotiating under the arbitration option, but without resort to arbitration, showed an average increase of 7.3 per cent. The 106 arbitral awards averaged 7.7 per cent. The 110 agreements negotiated under the conciliation-board option averaged 9.0 per cent. Put another way, wage and salary increases negotiated for units that chose the conciliation-board route averaged 1.3 per cent higher than the average increases obtained under arbitral awards; they averaged 1.7 per cent more than the average of directly negotiated agreements under the arbitration option for the 1967 – 1978 period as a whole (Table 19). The advantage in favour of the conciliation/strike route, according to the same study,[71]

> ...was concentrated in the 1971 – 75 period, a period marked by wage and price acceleration in the Canadian economy. Little difference was found between the two routes in 1967 – 70 because of the newness of collective bargaining for civil servants, the lack of militancy and general government policy of providing across-the-board wage and salary increases regardless of route. Similarly, little difference was found in 1976 – 78 because of wage and price controls, government restraint and high unemployment, factors that effectively placed a ceiling on wage and salary increases regardless of route.[72]

While the same study concluded that arbitration, on balance, has been a conservative force in relation to wages, as it has in some other respects,[73] it is clear from the above observation that the impact of impasse procedures on wage determination is, in turn, related to other variables: for example, the economic environment, government policy, the militancy and clout of the bargaining agent. Moreover it has also been noted, in a study of the impact of *compulsory* arbitration,[74] on which a larger body of literature exists, that it is

> ...impossible for a variety of reasons to disentangle in a definitive way the independent effect of arbitration from other wage determinants. On some occasions an arbitration award may set the pattern for ensuing awards and negotiated settlements. But, at other times, a negotiated settlement may set the pattern, and arbitration awards become parasitic with respect to it. . . . Without intimate knowledge of negotiations and the timing of settlements, it is impossible to identify the pace-setting settlements and other important interrelationships.

The interdependence of the entire process when a single employer, the federal government, bargains with a multiplicity of bargaining units and the difficulty of justifying any significant differences in treatment among them, have been considered in some detail in Chapter 6, above, but these topics are equally relevant to the present discussion.

Notes

1. One study found that wage increases in first collective agreements in the public sector were approximately 4 per cent higher than corresponding increases in renewed agreements in all years between 1968 and 1975. Moreover the largest negotiated increases in that period were in the lower wage categories. See Jean-Michel Cousineau and Robert Lacroix, *Wage Determination in Major Collective Agreements in the Private and Public Sectors*, study prepared for the Economic Council of Canada (Ottawa: Minister of Supply and Services Canada, 1977). (Hereafter referred to as *Wage Determination*.)
2. For comparisons of public and private wage-rate changes, see, among other sources, Douglas A.L. Auld, L. Christofides, R. Swidinsky, D. Wilton, *The Determinants of Negotiated Wage Settlements in Canada (1966–1975): A Microeconometric Analysis*, study prepared for the Anti-Inflation Board (Ottawa: Minister of Supply and Services Canada, 1979) (hereafter referred to as *Determinants*);

Morley Gunderson, "Public-Private Wage and Non-Wage Differentials in Canada: Some Calculations from Published Tabulations" (hereafter referred to as "Some Calculations") in David K. Foot, ed., *Public Employment and Compensation in Canada: Myths and Realities*, Vol. 1 of the series on Public Sector Employment in Canada (Toronto: Butterworth for The Institute for Research on Public Policy, 1978): 127 ff. (hereafter referred to as *Public Employment*); Morley Gunderson, "Public Sector Compensation in Canada and the U.S.", 19 *Industrial Relations: A Journal of Economy & Society* (1980), 257 ff. (hereafter referred to as "Public Sector Compensation . . ."); Government of Canada, *Agenda for Cooperation* (Ottawa, 1977); and Cousineau and Lacroix, *Wage Determination*.

3. Some researchers (for example, Cousineau and Lacroix, and Gunderson) have based their calculations on collective agreements covering bargaining units of 500 or more persons, other than construction workers; this same base was used by the federal government in its publication *Agenda for Cooperation*. Other researchers (for example, Auld *et al.*) have used a broader data base: collective agreements covering 200 or more employees. Gunderson's calculations are based on simple unweighted averages; both Cousineau and Lacroix, and Auld *et al.* used averages weighted by number of employees. Calculations in all the studies mentioned above were based on published and/or unpublished Labour Canada Statistics.

4. The federal government introduced a three-year program of mandatory wage and price controls in October 1975 (Anti-Inflation Act, S.C. 1974–75–76, c. 75). The program, popularly known as the 'AIB', after the Anti-Inflation Board that was mainly responsible for administering it, was introduced, in large measure, because of concern that wage settlements were rising at an unacceptable rate, particularly in the public sector. See Allan M. Maslove and Gene Swimmer, *Wage Controls in Canada, 1975–78* (Montreal: The Institute for Research on Public Policy, 1980).

   The argument, largely undocumented, that negotiated increases in the public sector, particularly at the provincial and local levels, had created an inflationary pattern for the rest of the economy, stimulated an interest in objective research on comparative compensation trends.

5. From Cousineau and Lacroix, *Wage Determination*; Gunderson, "Some Calculations", and Auld *et al.*, *Determinants* respectively.

6. Cousineau and Lacroix, *Wage Determination*; Gunderson "Some Calculations". On the other hand, Auld *et al.*, *Determinants* show a slightly lower rate of increase for the public sector as a whole than for the private sector, even in 1975. Auld's studies, however, like the others, show significantly higher increases in that year at the

provincial and local levels of government than in the federal government sector, and similar results appear in the health and education sectors. The federal government sector, according to Auld's calculations, had a 4 per cent lower rate of increase than the private sector and a 3 per cent lower rate than the public sector as a whole. See Table 12, below.

7. Gunderson, "Public Sector Compensation . . .".

8. Economic Council of Canada, *Lean Times*, Nineteenth Annual Review (Ottawa: Minister of Supply and Services Canada, 1982), pp. 10–11.

9. Douglas A.L. Auld, *Wage Behaviour and Wage Control in the Public Service* (Ottawa: Centre for the Study of Inflation and Productivity, Economic Council of Canada, 1979). (Hereafter referred to as *Wage Behaviour.)*

10. Tables 10 to 12 show that the federal government had the lowest annual wage increases of all sectors in the years immediately preceding the introduction of wage controls. Note also Table 13, which shows that the total percentage increase between 1968 and 1976 was less for the federal sector than for the rest of the public sector and less than for the private sector.

11. The largest relative increases in the federal public service for the period 1967–1977 appear to have been for workers in unique public sector occupations, such as letter carriers, correctional officers and air-traffic controllers, whose maximum wage rates increased by 151, 154 and 130 per cent respectively. See Mark J. Daniel and William E A. Robinson, *Compensation in Canada: A Study of the Public and Private Sectors* (Ottawa: The Conference Board in Canada, 1980). (Hereafter referred to as *Compensation in Canada*.)

12. For an analysis of trends in rates of pay for selected occupational classifications, including the different levels within each classification, see the Pay Research Bureau, *Trends in Rates of Pay in the Public Service of Canada, 1967–1975* (Ottawa, 1975). (Hereafter referred to as *Trends in Rates of Pay*.)

13. See pp. 385–87, below, on the 'Compression — Inversion' phenomenon.

14. Auld, *Wage Behaviour*, p. 15.

15. With respect to the first possibility, see pp 385–87, below, for a discussion of developments in non-bargaining-unit salaries; for the second, see Morley Gunderson, "Professionalization of the Canadian Public Sector", in Meyer W. Bucovetsky, ed., *Studies in Public Employment and Compensation in Canada*, Vol. 2 of the series on Public Sector Employment in Canada (Toronto: Butterworth for The Institute for Research on Public Policy, 1979), p. 81 ff. (Hereafter referred to as *Studies in Public Employment*.) See also note 18, below, concerning 'occupational mix.'

16. Gunderson's estimate of a 5 to 15 per cent advantage in the entry-level occupations, particularly for females (in Foot, ed., *Public Employment* and Bucovetsky, ed., *Studies in Public Employment*), is based on early 1970 statistics. In a later article (in *Industrial Relations: A Journal of Economy and Society*, 1980), he estimates that the advantage has dissipated in recent years and may by now have been virtually eliminated.

17. Daniel and Robinson, *Compensation in Canada*.

18. *Ibid.*, p. 4 (footnote 5). As the authors point out,

> A major problem encountered when comparing earnings for highly aggregated groups in the public and private sectors is that it is not possible to distinguish between the differentials that are caused by differences in occupational mix and those which are due to differences in compensation for the same labour resource. This is important in this study because of the higher percentage of professional and administrative employees in the federal government. Given this situation, one should not be surprised to find that the average payroll (total payroll divided by number of employees) is higher in the federal government compared to the private sector of the economy. Such statistics are virtually meaningless from the perspective of determining relative compensation in either sector.

19. *Ibid.*, p. 5. The eleven occupations, in three broad occupational categories, were as follows:

    - **Professional and Administrative** — economists and statisticians, engineers, computer systems administrators, and financial administrators;
    - **Technical Support** — draftsmen, data processors (conversion), data processors (production); and
    - **Office Support** — clerks, secretaries, typists, stenographers.

20. *Ibid.*, p. x.

21. *Ibid.*, p. xi.

22. *Ibid.*, p. 23.

23. *Ibid.*, p. 24. In contrast to the private sector and other levels of government where the pay data are mean rates of pay, the data for the federal government sector are presented as salary ranges. The authors note that "The maximum rates of pay for the federal government were chosen for comparison since, given the number of steps within salary ranges, it was felt that the tendency would be for a larger number of federal government employees to be receiving rates of pay that are closer to the maximum as opposed to the minimum" (p. 24, footnote 19). The fact that maximum rates in federal government employment were compared with mean rates in the private sector makes all the more significant the finding that the federal rates have, on the whole, not exceeded rates in the private sector.

24. *Ibid.*, p. 23.

25. *Ibid.*, p. 31.

26. Discussed in Chapter 6, p. 259, above.

27. See Daniel and Robinson, *Compensation in Canada*, Chapter IV, pp. 33–47, "A Comparison of Benefits in the Public and Private Sectors". The authors estimate total benefit costs, measured as a percentage of straight-time payroll, at approximately 3 to 4 percentage points higher in the provincial and municipal government sectors and approximately 4 to 5 percentage points higher in the federal government sector than in the private sector. Given the proportion of benefits to total compensation, the authors conclude that the inclusion of the benefit costs would not materially affect the earnings comparisons.

28. See Gunderson's estimate (note 16, above), in Bucovetsky, ed., *Studies in Public Employment*, and "Public Sector Compensation . . .". As we saw in Chapter 7, above, the fringe-benefit component of all compensation plans in the federal public service is frozen for the period in which the Public Sector Compensation Restraint Act applies. See also pp. 379–80, below.

29. House of Commons Debates, 28 June 1982, p. 18878.

30. Chapter 6, note 2, above.

31. Canada Post Corporation is included in Schedule II of the PSCRA. Schedule II lists the federal Crown corporations and government agencies to which that Act applies. See section 3 of the PSCRA for other groups to which the Act applies.

32. House of Commons Debates, 30 June 1982, p. 18965.

The material that follows in this note will be treated in more detail in the study of collective bargaining in the provincial public sector, currently in preparation. It appears here in summarized form because of its present topicality. Two provinces, British Columbia and Quebec, had legislated restrictions on public sector wages before the PSCRA was enacted. On 18 February 1982 the Legislature of British Columbia enacted Bill 28, the Compensation Stabilization Act, imposing limitations on wage increases in a broad area of public service that includes hospitals, schools, colleges and universities, as well as the civil service, and various government agencies and boards. Like the federal restraint program, the limitations on wage increases are for two guide-line years. However unlike the federal legislation, the limitations under the B.C. statute do not come into effect until existing collective agreements expire. There is no restriction on collective bargaining, but increases under any new agreement can be rolled back, by a board established to monitor the program, if they exceed the permissible limits. There are no figures mentioned in the law itself. Guide-lines established by regulation set out a range of permissible increases.

which could result in variations among groups up to 4 per cent, depending on particular circumstances.

On 23 June 1982 the Quebec National Assembly enacted unprecedented legislation to roll back wages of employees in the health, welfare and education sectors, as well as in the civil service and various government agencies and boards. This followed the unions' refusal to forgo an increase due under their collective agreements to help reduce the rising government deficit. Bill 70, an Act Respecting Remuneration in the Public Sector, extended the collective agreements, due to expire at the end of the year, for a three-month period during which wages would be rolled back, across the board, by 18.89 per cent. Bill 105, enacted 11 December 1982, following the breakdown of negotiations for renewal of the expiring agreements, substituted a sliding scale of wage cuts related to salary level, for the rollback, across the board, that had been provided under Bill 70. Approximately half the employees affected by Bill 105, An Act Respecting Conditions of Employment in the Public Sector, became subject to a three-month-wage rollback of 19.45 per cent, the maximum under the new Act, while about 20 per cent, comprising those in the lowest-wage categories, were exempt from the rollback provision; the rest fall between the two extremes. Bill 105 imposed new agreements, by decree, on the entire public and parapublic sectors, in addition to the wage rollbacks during the three-month extension of the expiring agreements. There is to be a general freeze on wage increases in 1983 and a ceiling on increases in 1984 and 1985 of 1.5 per cent less than the increase in inflation. However, there is a guaranteed minimum of 6.4 per cent in 1984 and 1985, should the increase in inflation fall below 7.9 per cent in either year.

Ontario was the only other jurisdiction with a legislated program of wage restraint by the end of 1982. Bill 179, the Inflation Restraint Act, covers a wider range of public employees than the legislation in B.C. and Quebec. It includes municipal employees, in addition to the groups covered in the two other provinces. The Ontario Act, which became effective 21 September 1982, reflects, in considerable measure, the pattern established by the PSCRA. Compensation plans that expire between 1 October 1982 and 30 September 1983 are extended for twelve months, with a maximum increase of 5 per cent. Those scheduled to expire after 30 September 1983 become subject to the controls on the first anniversary of their effective date, at which point the 5 per cent ceiling on increases comes into effect regardless of any other increase that might have been provided under the collective agreement. Like the PSCRA, the Ontario Act precludes merit increases, at the upper income levels, for the period of its application. It also makes transitional provisions similar to those contained in the PSCRA. For example, a compensation plan that has been agreed to in writing before 21 September 1982, is allowed to proceed for twelve months, provided that the previous agreement expired before 1 October 1982, and that the renewed agreement is implemented without change. The 5 per cent ceiling would then come into effect. Compensation plans that expired between October 1981 and 30 September 1982, and that had not been renewed by the effective date of the Act are extended for twelve months beyond their expiry date and limited to 9 per cent increases, following which the 5 per cent ceiling applies. The Ontario Act, like the PSCRA, suspends collective bargaining on all items with monetary implications for the period in which it is applicable. Like the PSCRA, however, it specifically exempts the human rights legislation from its provisions.

A few provinces have imposed restraints on negotiated increases, short of legislation. In Alberta, for example, the Premier committed himself to holding wage increases below 10 per cent in 1983; Cabinet then rolled back tentative settlements that had been reached between government negotiators and negotiators for the Alberta Union of Provincial Government Employees because they exceeded this limit. The Premier of Nova Scotia set a limit of a 6 per cent increase on total compensation for a one-year period following 15 September 1982, with the threat of legislation if the limits were not respected. Agreements signed before that date were not to be affected. The Newfoundland government has imposed controls short of legislation, that 'limit' increases for the next two years on a sliding scale: 7 and 6 per cent for those earning under $13 000 annually, 6 and 5 per cent for those earning more than $13 000 but less than $18 000, and 4 per cent for those earning more than the last figure. In Saskatchewan the policy is to keep increases in total compensation to 1 per cent below the rate of inflation for a two-year period, effective 30 September 1982. There has been no action to introduce either legislation or guide-lines in the Provinces of New Brunswick and Prince Edward Island. In Manitoba, the only province with an NDP government, the Premier has stated categorically that his government will honour its commitment to collective bargaining and will not embark on controls on the federal pattern

33. The term 'compensation plan' is defined in subsec. 2 (1) of the PSCRA as "the provisions, however established, for the determination and administration of compensation [including] such provisions contained in collective agreements or arbitral awards or established bilaterally between an employer and an employee, unilaterally by an employer or by or pursuant to any Act of Parliament."

34. Subsec. 8(2) of the PSCRA.

35. Honourable Donald J. Johnston, House of Commons Debates, 9 July 1982, p. 19183.

36. Subparagraph 9(1)(*a*)(ii).

37. Miscellaneous Estimates Committee, 27 July 1982, p. 96:90.

38. As reported in the Toronto *Globe and Mail*, 7 January 1983.

39. (1983) PSSRB file 148–2–86.

40. See Chapter 6, pp. 271–72, above.

41. See Chapter 10, pp. 442–44, below.

42.

Category	*Group*	*Sub-Groups*
Scientific and Professional:	a) Nursing	All except Nursing Consultants
	b) Education	Elementary & Secondary Teaching
	c) Occupational and Physical Therapy	
Technical:	a) Engineering and Scientific Support	Hospital Technicians
	b) Education Support	Teacher's Aides
	c) Ships' Officers	
Operational:	a) General Labour and Trades	
	b) General Services	
	c) Hospital Services	
	d) Printing Operations	
	e) Ship Repair	
	f) Ships' Crews	

43. Pay Research Bureau, *Trends in Rates of Pay*.

44. Before 1967, employees in these groups were employed under the provisions of the Prevailing Rate Employees General Regulations. Their wages were determined by comparison with the prevailing rates for similar jobs in the locations in which they worked. They were, and still are, known as 'prevailing rate employees.' However, in the course of bargaining, the parties have differed considerably about the prevailing rates to which their wages should be compared. They have disagreed, for example, about the weight that should be given to construction rates on the outside labour market in calculating rates for general labour-and-trades units.

45. Before 1967 employees in these groups were employed under the Ships' Officers and Ships' Crews Regulations. The two groups were originally certified as a single bargaining unit. One of the causes that led to the division into two units of the ship-repair occupational group (one for the east coast and one for the west coast) was the disparity in wage rates paid for similar occupations in the shipyards on the two coasts. (See Chapter 3, pp. 112–13, above.) In 1975, before the division, the bargaining agent for the

bargaining unit called a strike in order to obtain a wage rate for employees on the east coast, comparable to that offered by the employer for west coast employees. The strike was not supported by the west coast employees.

46. According to information provided by the Pay Research Bureau, regional rates were written into the first negotiated agreements of the following units: education, engineering and scientific support, ships' officers, general labour and trades (supervisory/non-supervisory), general services (supervisory/non-supervisory), hospital services (supervisory/non-supervisory), printing operations (non-supervisory), ship repair, ships' crews, and nurses (recruiting level).

47. In an agreement signed 15 July 1975, regional rates, which were originally applicable only at the recruiting level, were extended to nurses at all levels, with the sole exception of nursing consultants, who are still on a national salary scale. This arrangement was made retroactive to 30 December 1974. The educational support unit went on regional rates in its second round of bargaining in 1972; the occupational and physiotherapy unit made the same change in its fourth round of bargaining in 1976.

48. The introduction of regional rates for nurses, on the other hand, was designed to meet the needs of low-wage provinces, where recruitment and retention would be prejudiced by competition from national rates.

49. Compensation is generally not a very serious problem for managers experiencing recruitment difficulties. There is a broad range between the minimum and maximum rates of pay, and the rate paid within that range is at the discretion of the managerial decision maker. Indeed, if the rates at the recruitment level are inadequate, applicants may be enticed by an offer, made at the time of recruiting, to place them at a higher level. Retention of employees with skills and competence that are scarce and are therefore paid at significantly higher levels on the outside competitive market (for example, oil and gas engineers) presents a more serious problem. For methods of resolving this problem, and their ramifications, see pp. 383–85, below.

50. See p. 379, above.

51. See Pay Research Bureau, *Trends in Rates of Pay*.

An award for employees of the Workmen's Compensation Board under the Ontario Crown Employees Collective Bargaining Act, R.S.O. 1980, c. 108, has accepted the argument that lower-paid employees are harder hit by inflation than those in the higher-paid classifications, and that the former deserve special consideration in the allocation of wage increases. See *Canada Labour Views Reports*, 17 September 1979. Although the Public Service Arbitration Tribunal and the PSSRB, operating under the federal legislation, have given few indications about the principles they have applied in reaching a certain conclusion relating to wage increases, it is not unlikely that similar considerations would enter into their deliberations.

52. David Lewin and Shirley B. Goldenberg, "Public Sector Unionism in the U.S. and Canada", 19 *Industrial Relations: A Journal of Economy & Society* (1980), p. 253.

53. See Pay Research Bureau, *Rates of Pay in the Public Service of Canada*, a summary of salary rates and ranges, by occupational category and group, for both bargaining-unit and excluded personnel. Published quarterly.

54. For employees whose classification level would otherwise entitle them to membership in a bargaining unit, but who are excluded because they exercise confidential functions, salary increases have been tied directly to negotiated settlements for the relevant occupational bargaining unit. For a discussion of 'confidential exclusions' as distinct from 'managerial exclusions', see above, Chapter 2, pp. 31 – 32 and p. 38 ff.

55. (1979) Arbitral Awards file 185 – 2 – 201.

56. One observer suggested that this concern may be exaggerated, that it does not take account, for example, of:

    - The broad range in the rates of pay at each level of the SX 1 and SX 2 categories
    - The additional $5000 to $6000 available to incumbents of these positions in the form of performance pay (These figures do not appear in published *Rates of Pay*. As we noted earlier, however, entitlement to performance pay has been suspended, while the PSCRA applies, for employees whose salary range, as of 29 June 1982, stood at an annual maximum of $49 500 or higher.)
    - The nature of the qualities, skills and functions of some highly trained personnel at the upper level of professional bargaining units, which may, in fact, justify higher pay than those at the lower levels of the Executive Category
    - The fact that the person to whom an employee at the upper level of a bargaining unit may be accountable is frequently an SX 2 or above.

    The observer noted that these facts should be examined more carefully in considering the claim by employees in executive and supervisory positions that their pay is inadequate compared to that of their immediate subordinates.

57. As we saw in Chapter 2, p. 43, above, legislation that would have controlled negotiated increases at the upper level of the bargaining units died on the order paper. See Chapter 2, pp. 41 – 45 for a discussion of the 'management-team' concept.

58. See Chapter 2, pp. 43–44, above.

59. *News Release*, 10 July 1980.

60. *Ibid.*

61. S.C. 1976–77, c. 33.

62. This settlement has since been surpassed by the general services settlement discussed below.

63. Because the "equalization adjustment" was separated from the general percentage increase, the settlement did not disturb the pattern of percentage increases in the rest of the public service.

64. The agreement required Commission approval because pay disparities between men and women doing work of equal value had been the subject of a formal complaint.

65. Proceedings of the Miscellaneous Estimates Committee, 19 July 1982, p. 88:41.

66. L.W.C.S. Barnes and L.A. Kelly, *Interest Arbitration in the Federal Public Service of Canada* (Kingston: Queen's University, Industrial Relations Centre, 1975), pp. 21–22.

67. A.V. Subbarao, "Impasse Choice and Wages in the Canadian Federal Service", 18 *Industrial Relations: A Journal of Economy & Society* (1979), p. 236.

68. Felix Quinet, "Impasse Choice and Wages in the Canadian Federal Service", 19 *Industrial Relations: A Journal of Economy & Society* (1980): 360–62.

69. For Subbarao's response to Quinet's criticism, see 19 *Industrial Relations: A Journal of Economy & Society* (1980): 363–65. Subbarao defended his choice of 1974–1975 as the period on which to base his study on the following grounds:

    - As collective bargaining in the first two rounds was concerned primarily with catch-up, and as the unions were not sufficiently militant to contemplate strike action, differences in wage outcomes, according to dispute resolution specification, were not statistically significant.
    - Negotiations over wages were constrained by voluntary guidelines in the early 1970s and by compulsory controls from 1976 to 1978, making significant differences in wage outcomes unlikely in both these periods.
    - As the unions relied most heavily on impasse procedures in the mid-1970s, this period was most appropriate for comparing wage outcomes between both routes [to dispute resolution].

    In defence of his research methodology, Subbarao noted that his definition of base rate and computation of weighted averages were similar to those developed by Labour Canada's Collective Bargaining Branch.

70. George Saunders, *Interest Arbitration and Wage Inflation in the Federal Public Service*, Discussion Paper No. 162 (Ottawa: Economic Council of Canada, 1980).

71. *Ibid.*, p.x.

72. See Table 20.

73. See discussion in Chapter 10, pp. 458–60, below.

74. Bryan M. Downie, *The Behavioural, Economic and Institutional Effects of Compulsory Interest Arbitration*, Discussion Paper No. 147 (Ottawa: Economic Council of Canada, 1979), pp. 45–46.

9: *Duration, Implementation, Amendment and Revision of Collective Agreements and Arbitral Awards*

Effective Date of Agreements and Arbitral Awards

The effective date of a collective agreement under subsection 57(1) of the Public Service Staff Relations Act (PSSRA) falls, when an effective date is specified in the agreement, on and from that day; when no effective date is specified, the effective date falls on and from the first day of the month directly succeeding the month in which the agreement is executed. Under subsection 72(1) of the Act, an arbitral award is effective on and from the day on which the award is made or on and from such later day as may be specified in the award.

Duration of Agreement or Award

On the basis of subsection 57(2) of the PSSRA, a collective agreement is operative for a term of a least one year from the day on and from which it comes into effect. If no term is specified in the agreement, or if the term specified is for less than one year, the agreement is considered to be operative for a term of one year from its effective date.[1] This provision is now displaced by the provisions of the Public Sector Compensation Restraint Act (PSCRA) during the period that that Act is applicable to any particular bargaining unit. Subject to certain deviations mentioned below, every collective agreement that includes a compensation plan is declared by subsection 6(1) of the PSCRA to "continue in force without change for the period for which the compensation plan is extended." Subsection 4(1) provides that:

> Every compensation plan that is in effect on June 29, 1982 for employees [in the Public Service of Canada] . . . shall be extended for the period of twenty-four months
>
> (*a*) from the day on which the first increase in wage rates on or after June 29, 1982 would, [with certain exceptions mentioned below], occur under the compensation plan; or
>
> (*b*) where no increase in wage rates is to occur under the compensation plan on or after June 29, 1982, from the day immediately following the day on which the compensation plan would, but for this section, expire.

As we saw in Chapter 8,[2] above, the PSCRA made special provision for agreements tentatively reached before 29 June 1982 and for situations where an agreement expired before 29 June 1982 and no new agreement was entered into before that date. Subsections 4(2), 4(3) and 5(1) of the PSCRA adjust the applicable time frame to make appropriate allowance for these situations. In some instances the restraint period will continue for as long as three years.[3]

There is nothing in the PSSRA to prevent the parties to a collective agreement from giving retroactive effect to one or more of its provisions. It would appear that if the parties specify in their agreement that it is to have retroactive effect, they would be able to enter into an agreement that would actually continue in effect for a period of less than one year from the day it is entered into. There is no provision in the Act that bars the parties from entering into a collective agreement for a lengthier term than one year, no matter how much longer that term might extend.[4]

As far as an arbitral award is concerned, the Public Service Staff Relations Board (PSSRB) is required by section 73 of the PSSRA to determine and specify the term for which the award is to be operative. Except in the circumstances discussed below, and subject, of course, to the provisions of the PSCRA similar to those discussed above that apply to a collective agreement, an arbitral award may not be made for a term of less than one year or of more than two years from its effective date, that is, the day on which it becomes binding on the parties. In determining the duration of an award, subsection 73(1) of the PSSRA requires the Board to take into account,

> (*a*) where a collective agreement applicable to the bargaining unit is in effect or has been entered into but is not yet in effect,[5] the term of that collective agreement; and
>
> (*b*) where no collective agreement applying to the bargaining unit has been entered into,
>
> (i) the term of any previous collective agreement that applied to the bargaining unit, or
>
> (ii) the term of any other collective agreement that to the Board appears relevant.

As the PSSRB pointed out in the *Firefighters Arbitral Award Case*,[6] the foregoing provision is general and falls short of requiring that the Tribunal/Board should be governed, or even be guided, by it. The Board said that among the points that should be considered were:

- Any understanding reached by the parties about the duration of provisions that they had agreed on during their negotiations before the referral to arbitration
- The desirability of a longer term for the ensuing agreement if the previous agreement had been for a short term
- The desirability of making an award for less than one year if there had been a long delay following the last agreement's expiration.

In consideration of other agreements, it was suggested in the *Forestry Case*[7] that the bargaining parties, in formulating agreements for related occupational groups, might give thought to allowing for coincidence in the expiry dates of those groups' awards. Although this suggestion might apply most usefully to agreements binding units in the same occupational category, the Board held in the *Correctional Case*[8] that it might look at other collective agreements where similar circumstances indicated that the duration was relevant.

In the *National Film Board, Administrative Support Category Case*,[9] the parties executed a memorandum of agreement providing that certain articles enumerated in the agreement would be effective for three years; they referred other matters to arbitration. The agreement specified that any award relating to hours of work should remain in effect for two years, and the award concerning rates of pay and certain monetary items should have a duration of one year. The PSSRB stated that although it was anxious to give effect to the agreement of the parties, it considered that it was unable to do so since "The language of the Act contemplates one term for the whole of an award and makes no mention of different terms in different provisions of an award." The Board specifically determined that all provisions of the award relating to the matters referred to it must be operative for the same period of time.

In its decision the PSSRB drew attention to paragraph 49(2)(*b*) of the PSSRA. This paragraph provides that the parties may give notice to bargain for the renewal of an agreement within a period of two months before an agreement or award ceases to operate. The Board remarked on the situation that would arise if some provisions in an award ceased to operate at different times from others.[10]

Although, as we have seen, there is nothing in the PSSRA to prevent the parties to a collective agreement giving retroactive effect to one or more of its provisions, the situation is different with an arbitral award. A provision of an award may be made retroactive under subsection 72(2) "to the extent that it is capable of being retroactively applied, in whole or in part, to a day prior to the day on and from which the arbitral award becomes binding on the parties but not before . . . the day on which notice to bargain collectively was given by either party".[11] In the *Forestry Case* the PSSRB held that "although by subsection 72(2) a term or condition of an arbitral award is capable of being retroactively applied, by reason of the provisions of subsection 72(1), the arbitral award itself cannot be made retroactive to a day prior to that on which it was rendered. . . ."[12]

The PSSRA further provides in subsection 72(3) that:

> Where, in relation to any or all of the provisions of an arbitral award made in respect of terms and conditions of employment, there was previously in effect a collective agreement or arbitral award, the previous collective agreement or the previous arbitral award is displaced, to the extent of any conflict, for the term . . . for which the subsequent award is operative.

Implementation of Agreement or Award

In the early days after the PSSRA came into force, the employer took the position[13] that as far as the Treasury Board was concerned, a collective agreement was not sufficient in itself to establish terms and conditions of employment, and that the terms and conditions became effective only after an implementation order had been made under section 7 of the Financial Administration Act.[14] The PSSRB rejected this argument and held that on the basis of section 58 of the PSSRA, the employer was bound by the terms of a collective agreement whether or not an implementation order was issued. The Board commented that:[15]

> The issuance of an implementation order that purports to modify a collective agreement, or even the failure of the Treasury Board to issue an implementation order, cannot deprive a bargaining agent or any employee affected from asserting a claim to every right it or he may have acquired under a collective agreement nor can it deprive it or him of the right to process such a claim to finality before the appropriate forum under the Public Service Staff Relations Act. We fail to see how any implementation order of the nature that was issued in connection with the agreements here under consideration could be said to satisfy the obligation of the Employer under s. 56 of the Public Service Staff Relations Act to implement the agreements.

The bargaining agent subsequently withdrew its complaints.

As the situation now stands, under subsection 56(1) of the PSSRA, where a collective agreement specifies the period within which it is to be implemented, it must be implemented within that period.[16] Where no period is specified in the agreement, that agreement must be implemented within ninety days from the date of its execution, or within such longer period as may be determined by the PSSRB on application by either party. By section 74 of the Act, an arbitral award must be implemented within a period of ninety days, or such longer period as may be determined by the Board on application by either party.[17] However, whereas subsection 56(1) speaks, without limitation, of "the provisions of a collective agreement", section 74 calls for the implementation of "the rates of pay, hours of work, leave entitlements, standards of discipline and other terms and conditions of employment directly related thereto."[18] In both provisions implementation is made "subject to the appropriation by or under the authority of Parliament of any moneys that may be required by the employer therefor." The appropriate measures enacted by Parliament each session include, in aggregate terms, the amounts considered by the government to be necessary to cover salaries of staff for each department and program, including anticipated increases in staff and in salaries. If an agreement or award were to call for expenditures in excess of the amounts appropriated, provision would be made in supplementary estimates submitted to Parliament. Since the PSSRA came into force, the government has never sought from Parliament an appropriation specifically identified as required to implement a particular agreement or award. Nor has it sought to delay the implementation of an agreement or award on the ground that it had to apply to Parliament to appropriate the necessary moneys. Theoretically, it could avoid implementing an agreement or award by refusing to ask Parliament for the appropriation of the moneys required, but it has never done so.

The extent of the PSSRB's authority to grant an extension for implementation of an arbitral award was considered in the *Agriculture Arbitral Award Case*.[19] The Board held that it "has unfettered discretion to grant an extension of an arbitral award for any reason or reasons which satisfy the Board that an extension is warranted." In the *Commerce Arbitral Award Case*[20] the Board said:

> The implementation of an arbitral award is not a term or condition of employment *per se*. It is not a matter that may be dealt with by the parties, either unilaterally or collectively, nor is it one that may be determined by an arbitration board. It is, rather a matter that is determined pursuant to section 74 of the [PSSRA] which is a statutory device intended to ensure that the parties are not lax or dilatory in implementing the award.

The same principle would, of course, apply to the exercise by the PSSRB of its power to extend the time for the implementation of a collective agreement where no period for implementation is specified in the agreement. In such circumstances the Board has held that the relevant provision was not intended "to be used in a routine fashion to enable the Employer or, in an appropriate case, the Bargaining Agent, to escape the consequences that might flow from lack of reasonable foresight."[21] As the Board said in the *Biological Sciences, Agriculture and Forestry Agreements Implementation Case*:[22]

> One would ... expect that the Employer, at the time it is negotiating a collective agreement, would examine its resources to implement the agreement and would bargain for an implementation date that takes those resources into account. Where the agreement does not specify a period for implementation, one would normally assume that the Employer has made the necessary assessment of its resources and has come to the conclusion that

> they are adequate to enable it to implement the agreement within the ninety-day period fixed by [the Act]. The "safety valve" provided was designed to deal with situations that could not reasonably have been foreseen at the time the agreement was entered into or situations that develop subsequently and [that] are beyond the control of the Employer. There may also be instances in which the parties conclude during the course of negotiations that it may not be possible to implement certain provisions of the agreement within the ninety-day period specified, but are unable to determine at that time what period would be reasonably necessary for these provisions to be implemented. [The "safety valve"] would enable the Board in a proper case to grant an appropriate extension in light of the circumstances as they become apparent after the agreement has been executed.

Although the Board did accede to the request of the employer for an extension of time for the implementation of the agreements dealt with in its decision,[23] nevertheless, it cautioned the employer that "Henceforth, there will be a heavy onus on the Employer to establish that the delays in implementing an agreement were caused by circumstances that could not reasonably have been foreseen by the Employer or by matters beyond the control of the Employer."[24]

In the years immediately following the coming into force of the legislation, a new reclassification program was instituted in connection with the new collective bargaining system.[25] During that period one of the reasons given for the applications for extension of effective dates for implementation of agreements was that there were administrative delays in converting employees from the old to the new classes within the system. In several cases where an extension was sought, the problem, relating to the calculation of merit increases, was one of calculating pay for the retroactive period of an agreement. The Board's *Third Annual Report, 1969–70*[26] notes concerning complaints about non-implementation of collective agreements:

> It was evident throughout the proceedings in these complaints that the machinery for administering provisions of the collective agreements for the payment of retroactive increases was inadequate to meet the needs of the situation. In February 1970, the Deputy Minister of Services and the Deputy Receiver-General of Canada authorized a firm of consultants to make a study . . . of the Government of Canada's system for paying its employees . . . [and to make] recommendations for steps that should be taken that would lead to improvement. [They expressed the hope] that the report of the consultants [would] provide answers to many of the problems that came to the attention of the Board. . . .

In some of the instances in which more time to implement an arbitral award was sought, there had been a referral back, either to the Public Service Arbitration Tribunal or to the PSSRB, for completion or variation of an arbitral award. In others there had been an application under section 23 of the PSSRA (since repealed) referring to the PSSRB a question of law or jurisdiction that had arisen in connection with a matter that had been referred to the Arbitration Tribunal. In a number of cases a question was raised whether the award was in compliance with Anti-Inflation Act Guidelines, a matter that called for a decision either by the Anti-Inflation Board (AIB) or by the Administrator under the Anti-Inflation Act.[27] In all of these cases the employer contended that the arbitral awards could not be implemented until the Arbitration Tribunal or the PSSRB or the authorities under the Anti-Inflation Act, as the case might be, had disposed of the issues that were raised in such proceedings. In a number of instances the employer also argued that after disposal of the issues, additional time was required by the Central Pay Office to complete the necessary computations.[28]

In other instances[29] the PSSRB, in granting an extension, imposed the condition that the employer use maximum resources to implement the agreement at an earlier date, if possible, than the date set in the extension. In one case,[30] the Board added a further condition. This condition specified that the Board's decision should not prejudice any rights and recourses under the PSSRA that might have been acquired by certain individual employees under their complaints filed with the Board prior to the decision.[31]

Termination of Agreement or Award

The PSSRA does not entitle the parties to a long-term agreement to terminate that agreement before its expiration date. Of course, no agreement may now be terminated before the expiry date of the period fixed by the PSCRA for any particular bargaining unit. Concerning the situation that prevailed before that Act was passed, the Chairman of the PSSRB commented in the terms of reference to the conciliation board in the (1975) *Postal Operations Case*:[32]

> Although there is no provision of the Act which states in express terms that a collective agreement must have a fixed and unalterable termination date, an examination of the Act as a whole makes

> it obvious that there is an implicit requirement to that effect. There are a number of provisions of the Act that confer rights or privileges on third parties that can be exercised by them effectively only if a collective agreement has a fixed termination date which can be readily ascertained by an examination of official records or records readily available to any interested person or organization.

An agreement entered into for a term of more than two years does not bar a rival organization from applying for certification to displace the incumbent during certain periods.[33] If the rival organization is certified, it may then, under paragraph 40(1)(*c*) of the PSSRA, terminate the agreement, as far as it applies to employees in the bargaining unit, on two months' notice to the employer given within one month from the time it is certified.

Although, as noted above, the parties cannot terminate a collective agreement before its expiration date, subsection 57(3) of the PSSRA permits them to amend or revise "any provision of a collective agreement, other than a provision relating to the term of the collective agreement that, under the agreement, may be amended or revised during the term thereof." Amendment of an arbitral award is dealt with in section 76, which declares:

> The [PSSRB] may, upon application jointly by both parties to an arbitral award, amend, alter or vary any provision of the award where it is made to appear to the Board that the amendment, alteration or variation thereof is warranted having regard to circumstances that have arisen since the making of the award or of which the Board did not have notice at the time of the making thereof, or having regard to such other circumstances as the Board deems relevant.[34]

The several provisions of the PSSRA relating to amendment of a collective agreement or arbitral award are now subject to the provisions of the PSCRA. Section 7 of that Act states:

> The parties to a collective agreement, or the persons bound by an arbitral award, that includes a compensation plan that is extended under section 4 may, by agreement, amend any terms and conditions of the collective agreement or arbitral award other than wage rates or other terms and conditions of the compensation plan.

It would appear, then, that the entitlement of the parties to amend a collective agreement during its lifetime, except with regard to a compensation plan, has now been enlarged. In addition, the PSCRA entitles the parties to amend an arbitral award without the intervention of the PSSRB. Section 7 of the

Act does not envisage resort to the dispute-resolution processes provided for under the PSSRA, other than mediation, if the parties fail to agree.

Continuation of Terms During the Bargaining Process

Although a collective agreement or arbitral award may terminate before a new collective agreement is entered into or a new arbitral award is issued, the PSSRA provides in section 51[35] that:

> Where notice to bargain collectively has been given, any term or condition of employment applicable to the employees in the bargaining unit in respect of which the notice was given that may be embodied in a collective agreement and that was in force on the day the notice was given, shall remain in force and shall be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit, except as otherwise provided by any agreement in that behalf that may be entered into by the employer and the bargaining agent. . . .

This provision applies until the parties have entered into a new comprehensive agreement or an arbitral award has been rendered[36] or the conciliation-board process has been exhausted.[37] The terms and conditions that remain in force do not include only those that are set out in an applicable collective agreement or arbitral award operative at the time notice to bargain is given; they also include "any term or condition of employment applicable to the employees in the bargaining unit . . . that may be embodied in a collective agreement".[38]

Concerning the scope of the obligation under section 51 of the PSSRA, the PSSRB held in the *Open Landscaped Offices Case*[39] that "The terms and conditions of employment to which section 51 . . . must . . . be taken to apply are those that have the force of law at the material time, not those that merely exist or are operative at the material time." The applicant had based its case on the non-observance of a 'term or condition of employment' contained in a document "in the nature of a recommendation by the Director of Property and Building Management Branch of the Department of Public Works to the Chairman of the Treasury Board's Committee on Accommodation Standards." The recommendation did not appear to have been incorporated in any Treasury Board Minute; that is, it remained a recommendation. In *Canadian Air Traffic Control Association* v. *Treasury Board*,[40] counsel for the employer argued that the principle established in the *Open Landscaped Offices Case* was that "in order for a term or condition of employment not embodied under a collective agreement to be 'in force' at the time notice to bargain is given the term and condition of employment must be 'enforceable' as before a court or other judicial agency." In rejecting this argument, Deputy Chairman David H. Kates said:

> In my view, this is not what the [PSSRB] said at all [in that case]. What the Board indicated was that the term and condition of employment must be formalized in some manner, if not under a collective agreement, then pursuant to some other recognizable vehicle such as a regulation. Indeed a Treasury Board Minute would have accomplished this very purpose. But in the absence of something upon which the parties could rely in determining the existence or the viability of the term and condition of employment . . ., then there was nothing before the Board to establish that the alleged term and condition of employment was "in force".

In the case before him, the Deputy Chairman found that a term or condition of employment regarding voluntary and compulsory overtime, which modified the terms of the agreement, had been incorporated in, and formed part of, a memorandum; the substance of that memorandum was arrived at as the result of consultation between the parties. He went on to say:

> Of some consequence, there is also evidence that the parties treated voluntary overtime as an existing practice at all material times prior to the date of the memorandum. Can it seriously be contested in this case that the circumstances in which voluntary overtime would arise were not "in force" at the time notice to bargain was effected? In my view, "a handshake" followed by [a] party acting pursuant to the mutual accommodation represented by that "handshake" is sufficient for purposes of section 51 [of the PSSRA] to establish the immunity of that term and condition of employment from change during the negotiating period.

An application to the Federal Court of Appeal to review this decision was dismissed by a majority of the Court.[41] Urie J. said:

> There is . . . no question, as I see it, that the policy, so long as it subsisted, constituted, or resulted in, a term or condition of employment. Undoubtedly during the term of the agreement that policy which was, in effect, an unwritten amendment to [an article in the agreement concerning overtime] could have been rescinded by the employer. . . . However, at the time that notice to bargain was given no such rescission had been made and the policy, which, as I have said, effectively provided one of the terms or conditions of employment, was "in force" at that time.

> I am, moreover, unable to adopt the narrow view that the words "in force" in the context of the wording of section 51 mean "enforceable in law". They mean, in my opinion, "in place", "existing", "operating" or some word or words of similar import. Adoption of the view espoused by the [employer] would, it seems to me, run counter to the apparent purpose of section 51 which is that, after the notice to bargain, the employer-employee relationship existing immediately prior to the notice, in so far as terms or conditions of employment are concerned, should be preserved. . . . While that might not have been a right or privilege which could have been enforced as part of the collective agreement it certainly was one which existed or, in the words of the section, was "in force" when the freeze imposed by section 51 came into play.[42]

The effect of the Court's decision is that the protection afforded employees by section 51 of the PSSRA has been broadened considerably and is now much the same as that afforded employees under other labour-relations statutes in Canada, subject to the limitation that this protection applies only to terms and conditions of employment that are within the scope of bargaining under the PSSRA.[43] There still remains open a question whether a provision of a collective agreement that calls for consultation between the employer and a bargaining agent, as distinct from changes in terms and conditions of employment that may have been made during the 'freeze' period without consultation having taken place, remains in force during that period. In the *Open Landscaped Offices Case*, the Board commented that it entertained "some doubts as to whether the obligation to consult dealt with in [the agreement] can be regarded as a term or condition of employment applicable to employees. . . . The obligation could probably be more accurately described as a right, privilege or duty of the Bargaining Agent and the Employer. . . ."[44] In his decision in the *Air Traffic Control Case*, Urie J. said that in view of his decision on the construction of section 51 in the circumstances of the case, it was unnecessary for him to consider any representations concerning the failure to consult about contemplated changes in conditions of employment.

In decisions pertaining to section 51 of the PSSRA, the PSSRB has held that a group surgical-medical insurance plan which, irrespective of a provision of a collective agreement, had been available to employees who voluntarily wished to participate in it, was a term or condition of employment that fell within the ambit of the foregoing provision.[45] The Board also held that the alteration, during the period here under discussion, of working accommodation, that is, a change from enclosed offices to 'open landscaped offices', would constitute a change in a term or condition of employment that fell within the provision.[46] The Board expressed grave doubt that this provision had prospective application, that is, that it applied to a situation where an announced change in terms and conditions of employment, such as a change from closed offices to open landscaped offices, would not take effect until after the applicable dispute-resolution process had run its course. It observed that it could "find no authority in the [PSSRA] for the Board to issue what might be described as an anticipatory injunction in such circumstances." On the other hand, the Board held that the employer was entitled to alter working conditions relating to matters that fell within the exercise of its authority under section 7 of the PSSRA (management's reserved rights) without infringing section 51.[47] Again, where it lay within the unqualified discretion of the employer under the expired collective agreement to determine whether data processors should work a 7 1/2-hour day or an eight-hour day, with pay accruing at premium rates for the last half-hour of the eight hours, a reduction in hours to 7 1/2, after notice to bargain had been given, did not constitute a violation of section 51.[48] The Board said:

> ...the employer under the collective agreement had the unqualified discretion to change from an eight-hour work day to a seven and one-half hour work day before a notice to bargain [was] given. . . . It therefore follows that once notice to bargain was given, the employer continued to exercise that discretion and, in the exercise of that discretion, no change or alteration of a term or condition of employment occurred. To accede to [the bargaining agent's argument] would enable employees to benefit from rights during the section 51 time period not otherwise available to them during the operation of a collective agreement. . . . The potential for change in working conditions is a condition of employment which is applicable to employees at all material times before or after notice to bargain has been given.

Notes

1. Special provisions were applicable during the initial certification period: see subsec. 26(6) of the PSSRA and note 11, below.
2. See Chapter 8, pp. 377–79, above.
3. Miscellaneous Estimates Committee, 27 July 1982, p. 96:90.

4. Compare Quebec Labour Code, which declares that "the term of a collective agreement shall not be less than one year nor more than three years."
5. That is, where the parties have entered into a partial agreement and have referred the remaining items in dispute to arbitration. See below, Chapter 10, p. 439.
6. (1970) PSSR Reports K 533 at K 558.
7. (1976) PSSRB file 168–2–112.
8. (1980) Arbitral Awards file 185–2–216.
9. (1980) Arbitral Awards file 185–2–230.
10. See also in this connection *Auditing Case* (1979) Arbitral Awards file 185–2–196; *Printing Operations (Supervisory) Case* (1979) Arbitral Awards file 185–2–212. Subparagraphs 73(1)(*a*) and (*b*), quoted in the text, p. 409, above, speak of a collective agreement. *Query*: Should not the same principles be made applicable to a previous award or to other awards?
11. Special provision was made in paragraph (*a*) of the subsection about arbitral awards during the initial certification period. See PSSRA, s. 2, for definition of initial certification period.
12. See note 7, above.
13. *Hospital Service, General Labour and Trades Implementation of Collective Agreements Case* (1969) PSSR Reports K 376 at K 382–K 383.
14. See Chapter 3, pp. 73–74, above.
15. See note 13, above, at K 389.
16. In the *Manning et al. Case* (1969) PSSR Reports K 448 at K 451, the PSSRB said: "S. 56(1)(b) of the Act has no application where the period within which the collective agreement is to be implemented is specified in the collective agreement. Where the agreement does specify a period for implementation, the agreement must be implemented within the time so specified and the Board has no authority to extend that time."
17. In the *Lightkeepers Case* (1970) Arbitral Awards file 185–2–9, a proposal that adjustments in pay cheques should be made within ninety days was denied on the ground that the Tribunal had no jurisdiction in the matter. This was so because, under subsec. 56(1) of the PSSRA, Parliament had left it, not to the Tribunal, but to the parties themselves and to the PSSRB, under certain conditions, to set the period within which an award was to be implemented. The same ruling was made in the *Economists Case* (1970) Arbitral Awards file 185–2–13.
18. That is, the matters that fall within the scope of arbitration as provided for in subsec. 70(1). See above, Chapter 4, p. 156 ff.
19. (1976) PSSRB file 186–2–12.

20. (1979) PSSRB file 186–2–26.
21. (1969) PSSR Reports K 427 at K 430.
22. *Ibid.*, at K 429–K 430.
23. The Board said (*ibid.*, at K 430–K 431):

> In the instant case, there is evidence that the Employer was faced with a large number of agreements that had to be implemented more or less concurrently. Several bargaining agents were involved and each of them was pressing for priority, in the interest of its own constituents, in the implementation of the agreements pertaining to the bargaining units which they represented. Many complications arose, some of which could probably have been foreseen, some could not.

24. At K 433. In the *Commerce Case* (1977) PSSRB file 186–2–26, the Board had occasion to comment that "the implementation provision has not been treated with the urgency it deserves." Extensions have been granted for less than 1 per cent of the collective agreements that have been negotiated.
25. For a discussion of the reclassification program undertaken by the Civil Service Commission in 1964 and the problems encountered in the early stages of the certification process, see above, Chapter 3, p. 103 ff. The program of reclassification had not been completed at the time when collective bargaining commenced.
26. Pp. 64, 66.
27. The AIB authorities held that twelve awards (out of forty-nine issued under the PSSRA during the AIB control period) did not comply with the Anti-Inflation Act Guidelines.
28. See, for example, *Engineering and Land Survey Arbitral Award Case* (1971) PSSR Reports K 692; *Agriculture Case* (1976) PSSRB file 186–2–12; *General Labour and Trades Case* (1970) PSSRB file 186–2–2; *Information Services Case* (1974) PSSRB file 186–2–5.
29. *Correctional, Firefighters, Heating, Power and Stationary Plant Operations Agreements Implementation Case* (1968) PSSR Reports K 263 at K 264; *Radio Operations Agreements Implementation Case, No. 1* (1969) PSSR Report K 393, as well as other cases.
30. *Radio Operations Agreements Implementation Case, No. 1*, note 29, above.
31. As to remedies in connection with complaints concerning failure to implement a collective agreement or arbitral award, see below, Chapter 12, pp. 649–50. Up to 1 September 1981 there were ten requests for extension of time for implementing a collective agreement. Two of these were withdrawn, and eight were granted. During the same period, there were twenty-seven requests for extension of time for implementing an arbitral award. Seven of these were withdrawn and twenty were granted, two of the latter on consent of the parties.

32. Conciliation Board file 190–2–43. The Chairman referred to sections 30, 41, 49, 50 and 51 of the PSSRA. He also relied on subsection 57(3) and ruled that "No recommendation may be made the effect of which would be to enable the parties, either severally or jointly, to terminate the collective agreement prior to its fixed termination date."

    The Ontario Labour Relations Act, R.S.O. 1980, c. 280, subsec. 52(3), declares that except in certain circumstances irrelevant here, a collective agreement is not to be terminated by the parties before it ceases to operate, without the consent of the Ontario Labour Relations Board on joint application by both parties. Before the enactment of this provision, there were instances in which parties terminated an agreement and entered into a new agreement with a view to establishing a 'contract bar' that would prevent a rival trade union applying for certification within the time limit that would have been applicable under the old agreement.

    The Canada Labour Code makes the consent of the Canada Labour Relations Board necessary only where a collective agreement contains no provision relating to its term or where the term of the agreement is less than one year and the parties seek to terminate the agreement within the period of one year (R.S.C. 1970, c. L–1, subsec. 160(1) as amended by S.C. 1972, c. 18, s. 1). Longer agreements would therefore appear to be terminable on mutual consent at any time, even within the first year.

    J. Finkelman, *Employer-Employee Relations in the Public Service of Canada: Proposals for Legislative Change* (Ottawa: Information Canada, 1974), Part I, p. 244 (hereafter referred to as the *Finkelman Report*), recommended that the PSSRA be amended to conform with the Canada Labour Code. It would appear, however, that the applicable provisions of the Ontario Labour Relations Act would provide a more equitable approach. For a discussion of the problems that may arise under the Canada Labour Code provision, see the argument advanced in the *Library Science Case*, referred to in note 33, below.

33. See discussion concerning the *Library Science Case*, in Chapter 3, above, p. 86. This case illustrates the way that the parties' extension of a collective agreement during its lifetime can affect the right of a rival organization to apply for certification during the extended period. However, the PSSRB commented that "we are not to be taken as holding that this document is not binding as between the Employer and the Intervener. That may well be a matter that may have to be determined in some other proceeding."

34. Presumably, if the parties agreed to vary a provision in an award, it would not lie in the mouth of either of them to contend afterwards that the altered provision was invalid. *Query*: Would an employee

who was affected be barred from asserting a claim in a grievance about an award as it was initially made? *Query* also: What is the position of an employee under an agreement of which a provision has been altered by the parties when the alteration of that provision was not provided for in the agreement as originally entered into?

Under s. 76 of the PSSRA, twenty-one applications have been made to the PSSRB concerning the 178 arbitral awards that were issued up to 1 September 1981.

35. The language of the provision differs from that of similar provisions in many other labour-relations statutes in Canada, some of which are summarized in the *Canadian Armaments Research and Development (Canada) Case* (1969) PSSR Reports K 294 at K 298–K 300. These statutes *prohibit* in express terms the changing of working conditions and either declare that such a change is an unfair practice or make it an offence to introduce such a change. The PSSRA, in effect, treats such an alteration as a nullity.

36. Where the applicable dispute-resolution process is reference to arbitration, the parties may enter into a 'partial' collective agreement and refer unresolved matters to arbitration. (See note 5, above.) In the latter circumstance, the 'freeze' would endure until the award is rendered, even though a collective agreement had been entered into earlier.

37. Where a conciliation board has been established, the 'freeze' would continue until seven days had elapsed from the receipt by the Chairman of the PSSRB of the conciliation board's report. If the Chairman notifies the parties that he does not intend to establish a conciliation board, the 'freeze' would end on the date the Chairman notified the parties of his intention. (See Chapter 10, pp. 467–68, below.)

In the *Postal Operations Case* (1970) Conciliation Board file 190–2–7, the bargaining agent, the Council of Postal Unions, had proposed that a clause be included in the agreement, stating: "During the period of negotiations or until such time as a new Agreement is signed, the present Agreement shall continue in full force and effect." When the employer objected to the proposal, the Chairman of the PSSRB noted that the proposal was not referable to a conciliation board. He commented that if the intent of the proposal was that the then current collective agreement should continue in force until the next agreement was signed, the Council would be deprived of its right to engage in a strike. (See paragraph 101(2)(*a*) of the PSSRA discussed in Chapter 12, pp. 636–37, below.) If the intent was to vest in the Council power to determine in its sole discretion whether the employer would be entitled to alter existing terms and conditions of employment, the proposal would negate the very purpose that s. 51 was designed to serve.

In the *Letter Carriers Case* (1978) Conciliation Board file 191–2–90, a proposal was held referable that the collective agreement remain in effect until the signing of a new agreement or until seven days had elapsed from the time the parties received the report of a conciliation board.

38. S. 51
39. *Professional Institute of the Public Service of Canada* v. *Treasury Board*, (1973) PSSRB file 148–2–11, also referred to as the '*PIPS Case*' or the '*Open Landscaped Offices Case*'.
40. (1981) PSSRB files 148–2–61 and 148–2–62.
41. *Her Majesty the Queen in right of Canada as represented by the Treasury Board and Canadian Air Traffic Control Association* (1982) 2 F.C., 80 at 89–90.
42. Heald J., dissenting, did not concur with the approach of Urie J. about the meaning of the words 'in force'. He said the words mean 'binding power, validity'. In his view the conditions of employment in force on the critical date were those contained in the collective agreement, and any amendment of the agreement would have to have been in writing.
43. See Chapter 4, above.
44. See note 39, above. In the *Postal Operations Case No.* 7 (1972) PSSR Reports K 981, the expired collective agreement provided that if new classifications were created, the rates of pay for the new classifications were to be fixed by agreement between the parties. A new classification was established and a *pro tem* rate fixed for it unilaterally by the employer. The PSSRB held that the employer had failed to comply with s. 51 in that it did not carry out its obligation to confer with the bargaining agent in appropriate fashion in an endeavour to establish an agreed rate for the classification. The Board therefore directed that the employer meet and confer with the bargaining agent with a view to reaching agreement in accordance with the principles embodied in the provision in the expired collective agreement. It may be that this case is distinguishable from the *Open Landscaped Offices Case* on the ground that the provision in the expired postal collective agreement called for an actual agreement of the parties on the new rates to be paid to employees in the new classifications, rather than merely for consultation with the bargaining agent, as was the situation in the case discussed in the text.
45. *Medicare Cases* (1970) PSSR Reports K 505 at K 517.
46. *Open Landscaped Offices Case*, note 39, above.
47. See above, Chapter 4, pp. 154–55.
48. *Public Service Alliance of Canada and Treasury Board* (1979) PSSRB file 148–2–75.

Employees of the federal Government of Canada represent the most highly organized sector of the economy. Close to one hundred per cent of the federal government employees eligible to bargain collectively are members of employee organizations and are covered by collective agreements. Yet these people are the newest actors on the collective bargaining scene.

Collective bargaining rights, on the private sector model, have long been taken for granted in Canada, for employees of municipal governments and for workers in a wide range of other public services, including many federal and provincial government agencies and boards. Despite this fact, the federal government and all but one of the provinces were still resisting the extension of similar rights to their employees less than two decades ago.

The enactment of the Public Service Staff Relations Act in 1967 has been characterized as a 'bold experiment'. This Act replaced a unilateral system for the determination of most terms and conditions of employment for federal public servants with a bilateral system whereby employees were assured of a large measure of participation in the determination of those terms and conditions.

This study examines the Act in detail, considers how the parties have accommodated themselves to it, and discusses the problems they have encountered in adapting to some of its provisions. In conclusion, the authors present their recommendations for amendments to the law and for changes in some of the practices by the parties within the framework of the law.

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Volume

2

Collective Bargaining in the Public Service

The Federal Experience in Canada

Jacob Finkelman
and Shirley B. Goldenberg

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VOLUME TWO

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10: *Resolution of Bargaining Impasses*

In many instances the bargaining process results in an agreement between the parties. However, where the parties cannot resolve their differences through their own efforts, current labour-relations legislation provides various processes to assist them in reaching agreement. Public service collective bargaining legislation sometimes provides, also, for final and binding determination of the issues in dispute. In this chapter we shall examine the provisions of the Public Service Staff Relations Act (PSSRA) designed to deal with impasses in bargaining. It should be borne in mind, however, that this chapter deals primarily with the situation as it obtained before the Public Sector Compensation Restraint Act (PSCRA) came into force and, it is to be hoped, with the situation that will obtain after that Act ceases to have effect.

The Choice of Options

As we have already noted, the Preparatory Committee on Collective Bargaining in the Public Service was appointed in 1963 to make preparations for the introduction of an appropriate form of collective bargaining. The terms of reference then given to the Committee limited its action to making recommendations on arbitration as the appropriate dispute-resolution process. The Committee in its *Report*[1] expressed the conviction that in many parts of the public service, a strike would be quite indefensible and a lock-out unthinkable. However, a strike of postal workers did take place in 1965, shortly after the *Report of the Preparatory Committee* was released.[2] When legislation to implement the *Report of the Preparatory Committee* came to be drafted, the government gave consideration to the fact, as the Honourable E.J. Benson, then Minister of National Revenue and President of the Privy Council, who was responsible for the legislation, said:[3]

> At about the same time that the Preparatory Committee reported, it became increasingly clear that members of employee organizations in the Post Office department opposed the recommended system of dispute settlement as a matter of principle. In this position they were supported by spokesmen for organized labour in other areas of the community.
>
> In the circumstances, the Government decided to accommodate the views of those who were opposed to arbitration in principle by including in the legislation an alternative process of dispute settlement directly comparable to that provided in the Industrial Relations and Disputes Investigation Act.

The PSSRA provides for alternative dispute-resolution processes described in section 2 of the Act under the title "process for resolution of a dispute". These two processes are:

- Referral of a dispute to arbitration
- Referral of a dispute to a conciliation board.

The second type of dispute-resolution process, that is, referral of a dispute to a conciliation board, ultimately leads to the entitlement of the employees in the bargaining unit concerned to engage in a lawful strike. Where the first dispute-resolution process is applicable, that is, referral of a dispute to arbitration, section 101 of the PSSRA forbids the employees in the bargaining unit concerned to strike. By section 36 of the Act, the dispute-resolution process has to be specified, in the first instance, after the bargaining agent is certified. The process is binding for the round of negotiations following such specification and afterwards, on the basis of subsection 38(1), until it is altered by the bargaining agent before the commencement of any succeeding round of bargaining.[4] The Public Service Staff Relations Board's (PSSRB) *Regulations and Rules of Procedure*[5] provide that no alteration in the specification of dispute-resolution process may be made earlier than one month before notice to bargain may be given in accordance with section 49 of the PSSRA.[6] The time-frame set by this regulation is fixed so that the employees concerned may consider the implications of changing the specification for dispute-resolution procedure in an untroubled atmosphere. If a change in the specification process were to be allowed at an earlier date, it would mean that employees might still be affected by their emotional reaction to an unhappy experience with the result of the process that had led to the resolution of a dispute in the previous round of bargaining.

Although a bargaining agent that specifies that a particular unit refer a dispute to a conciliation board may ultimately call a lawful strike, the 'designated' employees in such a unit are forbidden to strike by paragraph 101(1) (*c*) of the PSSRA. (The PSSRA, in subsection 79 (1), defines 'designated employees' as those engaged in the performance of duties "necessary in the interest of the safety or security of the public.") Consequently one of the factors a bargaining agent must consider in determining which dispute-resolution process it should specify for a unit is the number and classes of employees in that unit who may be designated. Subsection 36 (2) of the Act therefore provides that:

> For the purpose of facilitating the specification by a bargaining agent of the process for resolution of any dispute to which it may be a party in respect of a bargaining unit, the Board shall, upon request in writing to it by the bargaining agent, by notice require the employer to furnish to the Board and the bargaining agent a statement in writing of the employees or classes of employees in the bargaining unit whom the employer then considers to be designated employees within the meaning of section 79, and the employer shall, within fourteen days after the receipt of such notice, furnish such statement to the Board and the bargaining agent.[7]

Requests under subsection 36(2) of the PSSRA were made regularly in the early days of the operation of that legislation, immediately after the certification of a bargaining agent. After the initial requests, resort was made infrequently to the subsection, except in situations where a bargaining agent was considering the advisability of altering the dispute-resolution process applicable to a particular bargaining unit, or where a new bargaining agent was certified. In view of the decisions of the Federal Court of Appeal and the Supreme Court of Canada in the *Canadian Air Traffic Control Association Case*,[8] discussed more fully below, it is not unlikely that much more frequent use will be made of the subsection. In partial answer to the contention of counsel for the bargaining agent in that case that a decision upholding the right of the employer to designate the majority of employees in the bargaining unit would reduce the effectiveness of legitimate strike action, the Federal Court of Appeal drew attention to the opportunity afforded a bargaining agent, under subsection 36 (2), to obtain from the employer a 'preliminary' list of designated employees before deciding on its choice of dispute-resolution procedure. The Court commented that if the designation involved most of the members of a bargaining unit, the bargaining agent could elect the arbitration process for dispute resolution. The Court appears to have overlooked the fact that a list furnished under subsection 36(2) of the PSSRA is not subject to challenge, whereas the bargaining agent is entitled to object to a list furnished under section 79 of that Act and to invoke the assistance of the PSSRB in determining the validity of the employer's proposals.[9] There is nothing to prevent the employer making excessive claims at one stage of the process and then making a more reasonable proposal at a later stage or vice versa. The experience of the bargaining agents has by no means convinced them that the requests for information under subsection 36(2) have met with a realistic response. This is not to suggest that the employer has sought to mislead bargaining agents. It is probable that the responsible authorities do not adequately screen the suggestions for designation that come at that stage from the staff of the department(s) concerned.[10] The result is that a bargaining agent is forced, in effect, to decide which option it should specify on the basis of the employer's unilateral claim to name the employees who are subject to designation. It was to meet this sort of situation that the *Finkelman Report*[11] recommended that "if, either by agreement of the parties or by determination of the [PSSRB] more than 50% of the employees in a bargaining unit are ultimately designated, the bargaining agent should be permitted, subject to consent in that regard being given by the Board, to alter its specification from reference to a conciliation board to reference to arbitration." The need for an amendment along the lines of this recommendation has become even more evident in light of the decision of the Supreme Court in the *Air Traffic Control Association Case* mentioned above.

The procedure for specifying the dispute-resolution process is simple. The PSSRB's *Regulations*[12] require the bargaining agent to file with the Registrar of the Board a signed form stating which process the bargaining agent has selected; this form must be accompanied by a statutory declaration to the effect that the signatory officer of the bargaining agent has been duly authorized to file the specification. The constitutions of the several employee organizations that represent employees in the public service do not contain any provisions governing how such authorization is to be obtained. In the very early days after the PSSRA came into force, an executive body within the organization, either the national executive or a group executive, decided which option was to be specified. Nowadays it is the common practice for a vote to be taken among the employees in a bargaining unit before an alteration in the process of dispute resolution is specified for the unit. The Board does not examine the validity of the authorization claimed in the form that has been filed. It simply acknowledges the specification or alteration in specification of the dispute-resolution process in a formal decision; a copy of that decision is served on the employer. The choice of dispute-resolution process rests exclusively with the bargaining agent and cannot be vetoed by the employer. The employer is bound by the bargaining agent's choice.[13]

By the end of the first fiscal year of the operation of the PSSRA, that is, by 31 March 1968, the dispute-resolution process had been specified for thirty of the units for which a bargaining agent had been certified. Arbitration was specified as the process for twenty-six of the units (approximately 20 000 employees) and referral to a conciliation board as the process for four units (some 29 500 employees).[14] By 1 September 1981, the count stood at seventy-five units for which arbitration had been specified (over 86 000 employees) and forty-seven units for which reference to a conciliation board had been specified (over 176 000 employees). The last figure includes over 51 000 employees in the Post Office, represented by the Canadian Union of Postal Workers (CUPW), the Letter Carriers Union of Canada (LCUC), and the Association of Postal Officials, now no longer subject to the PSSRA.

As of 1 September 1981, PSAC had specified arbitration for thirty-five units (about 62 000 employees) and reference to a conciliation board for twenty-five units (about 105 000 employees). By the same date, the Professional Institute of the Public Service (PIPS) had specified arbitration for nineteen units (about 15 000 employees) and reference to a conciliation board for ten units (over 5600 employees).[15] In an address to the annual meeting of the Canadian Industrial Relations Association on 3 July 1982, Leon Mitchell, Deputy Chairman of the PSSRB, stated that as of 31 March 1982, seventy-two units, comprising 74 240 employees (26 per cent of the employees entitled to engage in collective bargaining under the PSSRA) remained subject to the arbitration option. By 1 September 1981, a number of units had switched back and forth in opting for a dispute-resolution process. During 1981 a movement began among units represented by PIPS that had previously specified arbitration as the appropriate dispute-resolution process to alter that specification. The argument supporting this development was that there would be no need for the employees to resort to a full-scale strike; pressure could be exerted on the employer through rotating strikes. At PSAC's 1982 convention, a resolution was adopted recommending "to all its members" that they "opt for the conciliation/strike route as the dispute settlement method."

One study concluded[16] that the "remarkable switch to conciliation would seem to suggest that all is not well with the arbitration process (and it is noteworthy that most of the units that have changed to conciliation since 1970 have had experience with arbitration awards)." While there are no doubt deficiencies in the arbitration process,[17] it is possible that other factors have been equally, or even more, important in causing bargaining agents to alter their specification of dispute-resolution process. In the early days of the history of the PSSRA, the bargaining agents that selected reference to a conciliation board as the dispute-resolution process were chiefly those that formed part of the international or national trade-union movement and others who were ideologically committed to the principle that the strike was the ultimate weapon.[18] There is a variety of reasons that, in other instances, probably led to the alteration of the specification of dispute-resolution process over the years. These include the increasing militancy of members of public service employee organizations;[19] a growing sense of insecurity, based on the general state of the economy, about continued employment; the recruitment of senior personnel for staff positions in the public service organizations from among persons who acquired their experience in the ranks of the traditional trade-union movement; the conventional wisdom that the threat of a strike gave employees in certain units more 'muscle' in bargaining than they could have under arbitration; and the limited scope of matters that may be referred to arbitration.[20] Whether the trend that we have observed will continue, or whether it will show a reversal in view of the decision of the Supreme Court of Canada in the *Canadian Air Traffic Control Association Case*[21] remains to be seen.

Some bargaining agents believe that there is a tactical advantage to be found in choosing the conciliation-board process of dispute resolution, both in instances where the employees in the unit can conduct an effective lawful strike, and even in instances where they cannot. Although the PSSRA declares, in effect, that a conciliation-board report may contain recommendations only on matters that are within the scope of bargaining,[22] it has been the practice, as we shall see below, to permit a conciliation board to discuss with the parties some non-bargainable issues to see if a solution can be found for them. In addition, where a conciliation board is appointed, each party appoints to that board the member of its choice, who is likely to make recommendations favourable to its position.[23]

Some bargaining agents have been critical of the fact that a bargaining agent must specify the process, or an alteration in the process, of dispute resolution before notice to bargain is given. The position of these agents is that the process should be specified at the point of impasse.[24] Under the present arrangement, these critics maintain, the employer gains an undue advantage in bargaining. Since the scope of arbitration is narrower than the scope of bargaining, the possibility exists that if the bargaining agent chooses the arbitration option, the employer could arbitrarily refuse to bargain on non-arbitrable matters, or use the threat of withholding concessions on non-arbitrable matters to exert pressure on the bargaining agent to make concessions on arbitrable matters.[25] As the *Finkelman Report* pointed out,[26] perceived inequities in the present situation might be cured, in part, by enlarging the scope of matters that are subject to arbitration. However, the *Report* recommended that no change be made in the point of time at which the dispute-resolution process should be specified. An administrative problem would arise from such a change in connection with another feature of the PSSRA. As we shall see below, a change in the specification of process at the point of impasse would make it almost impossible to determine within any reasonable time limit which employees are to be 'designated' as employees who are forbidden to strike.[27] In addition:[28]

> ...there is a good deal of merit in the parties being aware at the outset — at the very commencement of the bargaining process —

> what the rules of the game for that particular round of bargaining will be. However that may be, [it is difficult] to see how, in equity, the time for specifying the process can be brought forward to the point of impasse, as the bargaining agents propose, and still permit the bargaining agents to retain exclusive right to determine which process to apply to a particular dispute. If the view of the bargaining agents were accepted, [in fairness] the employer would have to be given the capacity to deny a bargaining agent the right to proceed to arbitration. Although bargaining agents might gain an advantage under such an arrangement in some cases, . . . in the overall position, the disadvantages would outweigh the advantages. The employer would face public criticism if it rejected arbitration, in that it could be accused of deliberately inviting a strike. On the other hand, the employer is likely to refuse arbitration only where a strike of employees in a bargaining unit is not going to have a serious impact — the employer would exercise its veto only against the weaker units. It is scarcely conceivable that the employer would reject an invitation to arbitrate if the invitation were given by a bargaining unit that had the capacity to inflict serious inconvenience on the citizens. . . . [I]t is fair to say that the employees in quite a number of bargaining units have little capacity or desire to engage in an effective strike.[29]

However, this recommendation must be looked at in light of another recommendation in the *Finkelman Report*:[30] that a bargaining agent should be entitled to alter its specification where the number of employees designated exceeds 50 per cent of the membership of the bargaining unit.

The right to specify one of the two dispute-resolution processes is not barred by the PSCRA. Nevertheless, since neither of the processes will be available to bargaining agents during the period that that Act remains in effect, the exercise of the right until near the end of that period (that is, until within about two months before the restrictions in the Act cease to operate with respect to any particular bargaining unit) would be an exercise in futility.

Mediation

In some jurisdictions a person who functions in the circumstances to be discussed in this section is referred to as a 'conciliator' or a 'conciliation officer'. In other jurisdictions a person performing the same functions is referred to as a 'mediator'. Indeed, a person may be called a 'conciliator' or a 'mediator', depending on the point of time at which he becomes involved in the process of dispute resolution. In this chapter and in succeeding chapters, the terms 'conciliator', 'conciliation officer', and 'mediator' are used interchangeably unless the context requires otherwise.[31]

With few exceptions, public service labour-relations statutes in Canada make provision for the assignment of a mediator to assist the parties in a labour dispute to reach agreement if they have come to an impasse in bargaining on their own. Such assistance is available to the bargaining parties, under the PSSRA, both where the dispute-resolution process specified is reference to arbitration, and where it is reference to a conciliation board. Section 52 of the PSSRA vests in the Chairman of the PSSRB authority to appoint a conciliator, but only on request of one of the parties. The request is made by serving notice on the Board in writing that the bargaining parties are unable to reach agreement, and that the requesting party desires the assistance of a conciliator. Some experienced mediators think that in order to achieve settlement by direct negotiations whenever possible, mediation should not be made too readily available.[32] This view is reflected in some of the provincial statutes, which fix a time that must elapse after the commencement of bargaining before a request for the appointment of a mediator may be made. There is no time bar to the making of a request for the appointment of a conciliator under the PSSRA; that is, the request may be made at any stage of the bargaining. However, in order to ensure that conciliation services are not sought prematurely, section 52 of the Act provides that the granting of such a request rests in the discretion of the Chairman of the PSSRB. So far, when a request has been made, the Chairman has rarely, because of prematurity or for other reasons, had to exercise his discretion to refuse to appoint a conciliator. Refusal has not been necessary, since, in practically all cases, bargaining between the parties had been carried on for lengthy periods before one of them made a request.

The Chairman of the PSSRB has no express authority under the PSSRA to appoint a conciliator on his own initiative if neither bargaining party should make such a request, although such authority is conferred by the legislation of a number of provincial jurisdictions. However, it becomes evident in some instances that the bargaining parties need the assistance of a conciliator, but that both parties are reluctant to make a request in the belief that to do so would be taken as an admission of weakness. In some such circumstances, the Chairman has considered it advisable to designate a mediator, even in the absence of a request, in the hope that mediation may resolve the dispute or at least narrow the gap between the parties.[33] Needless to say, no mediator can serve a useful purpose if his intervention is not accepted, whether willingly or reluctantly, by both parties. In such circumstances an appointment is usually made only after the Chairman has consulted the parties, either jointly or severally. Outright refusal by a party to meet with the mediator is rare in the public service context, since it is likely to be looked upon as a sign of disregard of the public interest.[34]

In administering the provisions of the PSSRA, the Chairman of the PSSRB, in earlier days, took the position that no conciliator should be appointed on request of one of the parties where the other party had previously requested the establishment of a conciliation board or had referred the dispute to arbitration.[35] However, in more recent times, where it is evident that there has been no meaningful negotiation on a number of issues, the Chairman has appointed a conciliator at the instance of one of the parties, even after the other party has requested the establishment of a conciliation board. In such circumstances, too, after consultation and with the concurrence of the parties, a person described officially as a 'mediator' has occasionally been appointed, albeit after a measure of 'gentle arm twisting'.

Two examples will illustrate the sort of situation in which such a course has been adopted. In the negotiations between the employer and the Council of Postal Unions for a first agreement in 1968, few items had been settled at the time the Council applied for the establishment of a conciliation board. Within a few days after the Council's request was filed, the employer asked that a conciliator be appointed. The Chairman of the PSSRB rejected the employer's request, but persuaded the parties to meet with Judge René Lippé. The Council of Postal Unions was opposed to the appointment of a conciliator under section 52 of the PSSRA. Resort was had to a 'legal fiction'. Judge Lippé was officially identified as a 'mediator' on the understanding that the requisite steps to establish a conciliation board would not be interrupted or delayed in any way. Although Judge Lippé's mediation efforts at this stage did not resolve the dispute, he did succeed in narrowing the gap between the parties' positions.[36]

In 1972 negotiations between the employer and PIPS, at that time the bargaining agent for the employees in the economics, sociology and statistics bargaining unit, broke down soon after they had begun. Indeed, the parties had had no more than three or four relatively short meetings, during which they had engaged in a rather cursory examination of each other's proposals. Because the chairman of PIPS' bargaining committee believed that the employer was not honouring an undertaking by the spokesman for the employer that he would make an overall offer on economic issues at an early stage, the Institute refused to meet again and referred the dispute to arbitration. A number of the matters so referred, although within the scope of bargaining, were patently outside the scope of arbitration. The Chairman of the PSSRB persuaded the Institute to concur in the appointment of a mediator before the reference to arbitration was dealt with.[37] Again, the gap between the parties was narrowed, and the remaining issues were left to arbitration.

After the PSSRA came into force, the conciliators and mediators whom the Chairman of the PSSRB appointed were, for some years, persons from outside the public service who had acquired a reputation in mediating disputes in the private sector. In 1975 the PSSRB established an Office of Mediation Services (OMS) to answer the increasing demand for conciliation and mediation assistance. In its *Eighth Annual Report, 1974–1975*, the Board indicated that the OMS had made a significant contribution to the conciliation process. The *Report* stated:[38]

> In administering the dispute resolution function, the Chairman depends on the Director, Mediation Services to maintain close relationships with bargaining agents and employers, to keep in touch with the progress of negotiation or consultation activities and, when conditions appear to warrant it, to take measures appropriate to assist in preventing disputes and, where a dispute exists, to act quickly in providing appropriate conciliation/mediation assistance to seek to end the dispute.

Since the establishment of the OMS, its staff has dealt with an increasing number of cases, although the Office has continued to call on qualified persons from outside the public service as *ad hoc* conciliators and mediators.[39]

Since shortly after the OMS was established, it has been the practice that the Registrar of the PSSRB advises the OMS of every reference to arbitration. If neither party has requested the appointment of a conciliator before such a reference has been made, the OMS will review the situation; if it appears to the Office that mediation may contribute to a settlement, the matter will be explored with the parties. If the parties acquiesce, a mediator will be appointed, and the instrument of appointment will record their acquiescence. Although, as we shall see, the other dispute-resolution processes provided for under the PSSRA are in a state of suspension while the PSCRA is in effect, there does not appear to be any reason why resort to a conciliator may not be made at the request of a party in instances where an agreement or award expired before 29 June 1982, and no new agreement was entered into nor arbitral award issued before that date. Conciliation should, of course, be undertaken only if matters dealt with by the conciliator are limited to those permissible under section 7 of the PSCRA. Indeed, conciliators have been appointed in these circumstances in several instances, with instructions that they were to confine their efforts to such matters. Neither is there any reason why resort cannot be made to mediation to assist the bargaining parties to reach agreement on permissible items even during the restraint period, but only, of course, on consent of the parties, whether given willingly or reluctantly.

Where a bargaining agent has opted for the establishment of a conciliation board as the applicable dispute-resolution process, and the conciliation board has not succeeded in resolving the parties' dispute, a mediator is frequently appointed to assist them. This appointment is made on the initiative of the Chairman of the PSSRB, even though he has no statutory authority to take this step. The appointment is invariably made after consultation with the parties, and often, in the course of the consultation, they are asked to express their preference concerning the mediator to be assigned. Whether the mediator is appointed before or after a strike has occurred depends on the special circumstances of each case.

The function of a conciliator appointed under the PSSRA is to confer with the parties and try to assist them to reach agreement.[40] A conciliator is required by section 53 of the Act to report his success or failure to the Chairman of the PSSRB within fourteen days from the date of his appointment or within such longer period as the Chairman may determine. In practice, an extension of time is generally granted only after consultation with each of the disputing parties.[41] A conciliator may, on occasion, include in his report information concerning the position of the parties, and his views on the dispute or his report may be accompanied by a separate document containing information on the position of both parties, or he may communicate his views orally to the Chairman of the PSSRB or to the OMS. However, any comments of this nature are not revealed to the disputing parties. A mediator who is appointed on the initiative of the Chairman is not bound by the time constraints governing a conciliator, but a mediator's report is dealt with in the same fashion as the report of a conciliator.

Up to 1 September 1981, 871 collective agreements had been entered into under the PSSRA.[42] Conciliators and mediators have been appointed to assist the parties, either at the request of one of the parties or with the express or tacit consent of both parties, in slightly over 28 per cent of the sets of negotiations that have led to an agreement.[43]

There is little value in seeking to assess the degree of success achieved by conciliators in their efforts to assist disputing parties to reach an agreement. An informative assessment of this sort would have to take into account the number of items unresolved at the time the conciliator steps into the picture; the number of items unresolved at the time the conciliator reports that the parties have failed to reach complete agreement; the timing of the intervention of the conciliator or mediator; the intransigence of one or other of the disputing parties; the availability of a further dispute-resolution process, and so on. To examine each case in order to ascertain the effect of any of these conditions lies beyond the scope of this study. Nevertheless, of 137 instances in which a conciliator was formally appointed under the PSSRA at the request of one of the disputing parties, settlements were effected by the conciliator in seventy-four cases.

The mediator in the public sector encounters problems that do not complicate the efforts of a mediator in the private sector. Thus, for example, the former often has to deal with a management negotiator whose authority is circumscribed by a 'mandate' determined, directly or indirectly, by his *political* superiors, and approval of any modification of that mandate cannot be obtained as quickly as approval in an enterprise in the private sector. On a number of occasions, a mediator has been unable to resolve a dispute successfully because of such a situation. In addition the mediator operating in a public service dispute must take into account the limited scope of bargaining under public service collective bargaining legislation and the multiplicity of laws and directives to which public servants are subject. As William E. Simkin, one of the outstanding mediators in the United States, has pointed out:[44]

> The mediator's role in [a public service collective bargaining dispute] is onerous indeed. Somehow the parties must reach a fundamental distinction on many disputed issues. Is the scope of bargaining really limited by law and by obviously necessary and proper interpretations of law? If so, what is the extent of that limitation? Or is a rule or regulation being cited by agency management simply as an excuse for not doing something it doesn't choose to do? The mediator cannot be a decision-maker on such matters, but he must help the parties thread their way through the maze.

Arbitration

The Process

In the literature on collective bargaining, much attention has been devoted to discussing whether the mandatory arbitration of interest disputes is compatible with, or destructive of, the process of collective bargaining that is now generally accepted as a feature of the labour-management relationship. There would be little profit in examining here the pros and cons of the arguments that have been advanced by scholars and practitioners,[45] both for the public sector and for the private sector. As we have seen,[46] reference of an interest dispute to arbitration at the option of the bargaining agent is provided for under the PSSRA. It behoves us, therefore, to examine how arbitration has worked as a dispute-resolution process under the Act, to assess, if possible, its impact on the bargaining process, and to ascertain what its shortcomings may be so that we can determine how the process may be improved.

On the basis of the recommendations of the Preparatory Committee on Collective Bargaining in the Public Service of Canada,[47] the PSSRA originally provided for the establishment of a Public Service Arbitration Tribunal that operated separately and apart from the PSSRB.[48] The *Finkelman Report* recommended that interest disputes should be dealt with by a reconstituted Public Service Staff Relations Board, rather than have the arbitration function segregated in a separate tribunal.[49] Legislation to implement this recommendation was enacted in 1975.[50] However, as we shall see in Chapter 13, the composition of the Board when it exercises the arbitration function retains basically the characteristics of the Tribunal before the amendment. This means that the arbitration function of the Board is exercised by a 'permanent' member of the Board, as presiding officer, and one member drawn from each of two panels; these two panels are made up of persons representing respectively the interests of the employer and the interests of employees. The amended legislation, in subsection 62(1) of the PSSRA, empowers the Chairman of the PSSRB, if he considers its advisable, to appoint an arbitrator in place of the Board to deal with any matter in dispute referred to arbitration. So far, however, there has been no appointment under this provision.

Where the dispute-resolution process specified is arbitration, the parties are required by section 50 of the PSSRA to meet and commence to bargain collectively in good faith and to make every reasonable effort to conclude a collective agreement.[51] In the course of such bargaining, they may reach agreement on all issues in dispute and enter into a collective agreement to govern their relationship for the ensuing period. Again, they may reach agreement on some, but not all, issues in dispute.[52] In that event the legislation contemplates that they will enter into a collective agreement on the matters on which they have been able to agree. After that each of the parties has seven days, under section 63 of the PSSRA, within which it may refer to arbitration any matter still in dispute that was a subject of negotiation during the period before arbitration was requested, but on which the parties were unable to reach agreement. In the *Engineering and Land Survey Case*,[53] the PSSRB said:

> The statute . . . establishes two criteria as to whether a matter was the subject of negotiations, viz: (1) bargaining in good faith; and (2) with a view to concluding a collective agreement. Unless these two criteria have been met by each of the parties, no entitlement to arbitration exists. . . . There can be no negotiation in good faith without disclosure of a proposal for consideration and response by the other party. Nor can a collective agreement be concluded without a specific proposal of a subject matter being made in the course of negotiations for inclusion therein. That is not to say that the parties may not or indeed will not, vary their positions they adopted during negotiations when they submit a matter for arbitration. But some specific proposal must have been made to make it a matter that was "a subject of negotiation between the parties during the period before arbitration was requested in respect thereof."

However, although the parties are required by section 50 of the PSSRA to bargain in good faith *and* to make every reasonable effort to conclude a collective agreement, section 63 of the Act does not attach as a pre-condition to a reference to arbitration that the parties have made such a reasonable effort. If no matter is referred to arbitration within the stipulated time limit — a statutory time limit that cannot be enlarged either by consent of the parties or by leave of the PSSRB — the collective agreement the parties have entered into is the instrument that will govern their relationship for the duration of the agreement. If additional matters are referred to arbitration, the matters in dispute, provided that they are matters that may be referred to arbitration as specified in section 70 of the Act, are dealt with by the PSSRB in the manner described below, and the Board, on the basis of subsection 72(1), makes a final and binding award. Arbitration can also be requested if the parties are unable to agree on any matter at all that has been the subject of collective bargaining.

A detailed procedure is set out in the PSSRA for the reference of a dispute to arbitration. The party making the request is required by subsection 63(2) to specify in the notice the terms and conditions of employment concerning which it requests arbitration and its proposals concerning the award to be made by the Board in respect of its request; it is also required to submit a copy of any collective agreement that has been entered into by the parties. On the basis of section 64, the Secretary of the Board forwards a copy of the notice to the other party. That party is required to notify the Secretary in writing, within the following seven days, of any additional matter that was the subject of negotiation, but on which the parties were unable to reach agreement, and concerning which the responding party requests arbitration, together with that party's proposal concerning the award that is to be made by the Board with respect to its request.[54] In the *Communications Case*[55] it was held that the failure by a party to state its 'proposals' did not deprive the Tribunal of jurisdiction to deal with a matter in dispute provided that the proposals were identified in the brief submitted by the party to the Tribunal, that no serious prejudice had been caused to the other party, and that that party was given full opportunity to contest the proposals. The same principle would now, of course, apply to an arbitration reference to the Board.

Bargaining does not invariably end once a dispute has been referred to arbitration. Indeed, such a reference may well create a deadline that induces the parties to reach agreement. The PSSRA encourages the parties to resolve their differences, or some of them, even after a reference. To this end, the Act provides in subsection 67(2):

> Where, at any time before an arbitral award is rendered, the parties reach agreement on any matter in dispute referred to the Board . . . and enter into a collective agreement in respect thereof, the matters in dispute so referred to the Board shall be deemed not to include that matter and no arbitral award shall be rendered by the Board in respect thereof.

The PSSRA contemplates that the parties will have incorporated in a collective agreement those items on which they have agreed before the reference to arbitration. However, the practice has developed, especially in instances in which PIPS is the bargaining agent, for terms agreed upon before a reference to arbitration to be noted, but not included, in a collective agreement until after the award has been issued. After that, the parties proceed to enter into a collective agreement that incorporates the award as well as other terms agreed upon either before or after the award is issued.[56]

The PSSRB has been given authority by paragraph 19(1)(*g*) of the PSSRA to make rules of procedure for arbitration hearings, but it is enjoined by section 69 to give full opportunity to both parties to present evidence and to make submissions to it. However, as the Tribunal observed in the *General Labour and Trades Cases*,[57] "although it is obliged to consider proposals made by parties appearing before it, it is not bound in any way to adopt their suggestions of the approach it should follow in making its Award."

The jurisdiction of the PSSRB in making an arbitral award is confined within limits specified in section 70 of the PSSRA.[58] An arbitral award "may deal with rates of pay, hours of work, leave entitlements, standards of discipline and other terms and conditions of employment directly related thereto," but only with those of employees in the bargaining unit concerning which the request for arbitration was made. It may not deal with matters that are not bargainable under the Act. Again, apparently for greater certainty, it is expressly provided[59] that an arbitral award may not "deal with the standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees". Finally, it may not deal with any term or condition of employment that was not a subject of negotiation between the parties during the period before arbitration was requested concerning it. In the *Computer Systems Case*[60] it was held that "'a term or condition of employment . . .' becomes *a* subject of negotiation as soon as one party is notified to that effect by the other, the whole before arbitration is requested. . . . even if it [were] true, *in fact*, that the parties did not really negotiate (whatever be the reasons therefor) such term or condition during the period before arbitration."

Factors to be Taken into Account in Arbitration Proceedings

An arbitrator or board of arbitration called on to make an award in a bargaining impasse is faced at the very outset with the question: What criteria are to be applied in making the award? Indeed, the parties themselves encounter the same problem in determining the nature of the representations that will be expected of them: "Unless there is some standard by which the relevance of proofs can be judged and the cogency of arguments measured, the litigant's participation in the process of decision making becomes an empty form."[61]

The Preparatory Committee, conscious of the role that the proposed Arbitration Tribunal would be called upon to play, expressed the belief "that the parties to bargaining should have an indication of the factors to be taken into account when a dispute goes to arbitration. We have concluded that the governing statute should provide the Arbitration Tribunal with some guidance of a general nature";[62] and it set out the factors that should apply. The recommendations of the Committee were implemented in the legislation. Section 68 of the PSSRA provides that:

> In the conduct of proceedings before it and in rendering an arbitral award in respect of a matter in dispute, the Board shall consider
>
> (*a*) the needs of the Public Service for qualified employees;
>
> (*b*) the conditions of employment in similar occupations outside the Public Service, including such geographic, industrial or other variations as the Board may consider relevant;
>
> (*c*) the need to maintain appropriate relationships in the conditions of employment as between different grade levels within an occupation and as between occupations in the Public Service;
>
> (*d*) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and
>
> (*e*) any other factor that to it appears to be relevant to the matter in dispute.

No decision of the Tribunal or of the Board has discussed the relative weight to be given to each of the factors listed in section

68 of the PSSRA, or whether the factors are all of equal weight. The only comment made on these points appears to be that made in the *Architecture and Town Planning and Economics, Sociology and Statistics Case*:[63]

> It is obvious that [the factors listed in section 68] are couched in broad general terms. They are akin to isometric lines from an observance of which an informed forecast may be made by the Tribunal. Despite what might be considered by some as imprecisions, they do provide some terms of reference for the Arbitration Tribunal to observe.[64]

During the period when the Anti-Inflation Act[65] was in force (16 December 1975 to 31 December 1978), the question arose whether the Anti-Inflation Act and the "Guidelines" issued under it were binding on the PSSRB and constituted one of the factors relevant to a matter in dispute that the Board had to consider. In the *Agriculture Case*[66] the Board held that factors (*b*), (*c*) and (*e*) listed in section 68 of the PSSRA were "influenced and affected, either directly or indirectly, by the Anti-Inflation legislation," and it answered the question in the affirmative. However, in this case and in several other cases, the Board awarded increases that the Treasury Board considered in excess of the "Anti-Inflation Guidelines". The awards were brought to the attention of the Administrator under the Anti-Inflation Act and the Anti-Inflation Board, and these authorities held, in effect, that arbitral awards under the PSSRA were subject to the Anti-Inflation Act; the Federal Court of Appeal upheld this position.[67]

Since paragraph 68(*b*) of the PSSRA lists "the conditions of employment in similar occupations outside the Public Service" as one of the factors to be considered in making an arbitral award, one would have expected that evidence presented at a hearing on a reference to arbitration would include material on 'aggregate compensation', that is, the aggregate of pay and the monetary equivalent of allowances, benefits, and other related terms and conditions of employment. Until recently the advocates for the employer did not make any serious effort, in arbitration proceedings, to present evidence on the aggregate compensation of the employees concerned in the reference. Bill C-28[68] would have required the PSSRB to base an award on a comparison with aggregate compensation for similar or analogous work in organizations that offer goods and services for profit. Failing the availability of representative data from organizations of this type, the comparison was to be made with other organizations outside the federal public service (presumably other public service organizations), and only as a last resort were internal relativities to be taken into account. The Bill would also have eliminated the factor of "the needs of the Public Service for qualified employees".[69] In addition it would have limited the annual maximum wage or salary to be allowed under an arbitral award to $33 500, although that figure would have been subject to periodic adjustment. Finally, the Bill would have limited the maximum salary that could be negotiated under a collective agreement in the same manner as would have obtained with an arbitral award. Bill C-22[70] contained provisions relating to aggregate compensation that were similar to, but not identical with, those in Bill C-28. The preferable 'outside' comparison was to be made with "a representative selection of organizations outside the Public Service that offer goods or services for profit". Bill C-22 did not contain any reference to monetary maxima, as had Bill C-28. The former would have 'restored' the needs of the public service for qualified employees as a factor to be taken into account.[71] It also would have instructed a conciliation board to take into account the factors that were to be considered in making an arbitral award.

The Nature of the Arbitration Process and Procedure

The PSSRA prescribes in section 69 that on a reference to arbitration, both parties are to be given full opportunity to present evidence and make submissions to the PSSRB, and the Board has power, under section 22, to summon witnesses. One might therefore assume that the arbitration process is of a judicial nature. Nevertheless, as Leon Mitchell, then Deputy Chairman of the Board, charged with the administration of the arbitration provisions of the Act, noted in January 1978:[72]

> The parties as a general rule do not present evidence under oath. They make submissions in the form of briefs. The contents of their submissions are purported to be facts. The facts are not subject to cross-examination.[73] The party adverse in interest usually submits totally "different" facts or even "contradictory" facts. There is no testing of the validity of any of these allegations except the nature and stature of the authority of the data relied upon.
>
> ...each party presents only such data as will support its predetermined position and not such facts as are required by the statutory criteria. The . . . Board is frequently in no position to make findings of fact as contemplated by the statutory criteria because the so-called evidence submitted to it by the parties is

> entirely self-serving. In short the presentation of the case to the tribunal does not in substance, or in form, resemble a judicial process.

It can, perhaps, be said of an arbitral award under the PSSRA what has been said of an award under Australian industrial relation's legislation, that "Juridically, it is of a legislative not an interpretative or judicial nature though the process by which it is arrived at is judicial in nature."[74]

For many years the parties asserted that their obligation was to present to the PSSRB the facts in support of their respective positions, and not the facts relating to the Board's responsibility to make an award. They took the position that consideration of the relevant criteria outlined in the PSSRA was the duty of the Board, and not the responsibility of either disputing party. To overcome the reluctance of the parties, the Board instituted a new procedure in the latter part of 1977. Immediately following the submission to the Board of a request for arbitration, a form letter is sent to each of the parties, outlining the minimum information required to enable the Board to apply the criteria. The form letter reads as follows:

> Each party shall include in its initial written submission to the arbitrators the following information:
>
> 1. A comment by each party regarding the needs of the Public Service for qualified employees. The basic information is available to the employer. However, each party should indicate whether any problems in recruitment or retention of qualified personnel exist in the employee group affected by this arbitration proceeding.[75]
> 2. (a) Which occupations outside the Public Service, if any, should be considered to be "similar occupations"?
>   (b) What are the prevailing terms and conditions of employment in such similar occupations that are relevant to the matters in dispute?
>   (c) In considering the information submitted in (a) and (b) above, what other factors should be deemed to be relevant in relation to the matters in dispute?
> 3. What are the comparable conditions of employment between the occupations affected by this arbitration proceeding and other related occupations in the Public Service to enable the Board to determine an appropriate relationship between them and between the grade levels within the affected occupations? The said comparisons should be relevant to the matters in dispute.
> 4. Each party shall submit information to enable the Board to establish fair and reasonable terms and conditions of employ-

> ment. Among other factors that each party may wish to submit for consideration by the Board, the following should be included:
>
> (a) What trends in terms and conditions of employment have been in effect for "similar occupations" during the last five or more years inside and outside the Public Service as they affect each matter in dispute?
> (b) Show and explain the deviation, if any, of the affected employee group in relation to such trends for each matter in dispute.
> (c) Show the change in the Consumer Price Index from the effective date to the expiring date of the last collective agreement. Also the last available information on the Consumer Price Index. . . . [76]
>
> 5. Each party may:
>   (a) Submit any other factors that in its view should be deemed relevant by the arbitrators.
>   (b) Submit any comment as to relevance or weight to be given to any factor mentioned above.
> 6. Each party shall show the source of each item of information submitted except where it is impractical to do so.
> 7. Treasury Board shall timely disclose to the Board and to the Bargaining Agent
>   (a) The number of employees in the Bargaining Unit.
>   (b) The number of such employees in each classification and in each rate of pay.
>   (c) The total payroll cost of salary and each fringe benefit.
>   (d) Any other relevant information requested by the Bargaining Agent available exclusively to the Employer, provided such information is not deemed by the Employer to be classified or confidential.

The calibre of the presentations to the Board since this directive was issued is said to have improved significantly.

In the earlier history of the legislation, the parties made their presentations to the Arbitration Tribunal at the outset of a hearing, usually by reading prepared briefs; after that, they made additional oral observations. In most instances they reserved the right to submit, and did submit, post-hearing rebuttal briefs at a later date. To expedite the process, the practice has been established in the last few years for the parties to exchange briefs a week before the hearing; this development enables "each party to deal more effectively with the information and its interpretation urged by the other party during the hearing." The briefs are also made available, as soon as the PSSRB receives them, to the members of the division of the

Board assigned to an arbitration reference. The Board now discourages the filing of post-hearing briefs. With very few exceptions, the parties now regularly observe this procedure.

It is generally understood that offers and counter-offers made during the bargaining process are made without prejudice and may not, in the course of a hearing, be revealed to the PSSRB by a party opposed in interest. The same understanding applies to any suggestions made to or by a conciliator who has participated in the bargaining for the purpose of seeking accommodation. Needless to say, this policy disposes the parties to engage more readily in the free exchange of proposals and counter-proposals before a reference to arbitration. Nevertheless, there is always the possibility that since the tribunal that is called on to make an award includes two 'representative' members, a party may disclose to the member selected as representative of its interests the substance of the position it has taken during bargaining or the position of the other party. At an earlier stage of the history of the legislation, the practice was not uncommon — although by no means universal — for the chairman of the Arbitration Tribunal to encourage the 'representative' members to consult the party whose interests they respectively 'represented'. This usually occurred where the presentation to the Tribunal at the hearing appeared to the chairman to be inadequate, or where it did not make readily apparent to the Tribunal the full implications of a proposal from one or other of the parties. Where this sort of consultation was practiced, the award might tend to be accommodative. The more recent practice has been different. Private discussion of a case between a Board member and a party is discouraged. A memorandum issued to Board members, bargaining agents and the employer, in June 1977, by Leon Mitchell, discusses the duty of a member of the Board and contains the following statement:[77]

> An arbitrator undertakes (in his oath of office) [under section 109 of the PSSRA] to be faithful and honest. Faithful to whom? Certainly not to any party. I would think that one accepts the responsibility to be faithful to the Board in carrying out its duties. Those duties include arriving at a decision consistent with the criteria contemplated by Section 68 of the statute. That section in turn requires the Board to arrive at its award on the basis of objective data and subjective evaluation of it including the need to establish terms and conditions of employment that are fair and reasonable.
>
> I would therefore conclude that a member of the Board can faithfully and honestly perform his duties only if, to the best of his

> ability, he impartially and properly interprets and applies the data available. He ought not to do so as an advocate of the position of an interested party. This does not however mean that he may not honestly believe that the information received by the Board supports the position of a party the interests of which he [represents]. What is important is that his conclusions are derived from:
>
> (a) information submitted openly to the Board during a hearing, and
>
> (b) information received by the Board in the presence of both parties, and
>
> (c) that an opportunity was given to the party receiving the information to respond to it.
>
> These criteria are critical. In my opinion decisions based on information undisclosed to either party or to which either party is denied an opportunity to respond could not be said to be arrived at honestly within the context of the provisions of the statute. The Board is required to give full opportunity to both parties to present evidence and make submissions to it . . . and not to one of its members. Nor indeed ought any weight to be given to information not disclosed to both parties except such information of which a quasi-judicial tribunal may take judicial notice.

Hearings in arbitration proceedings are relatively short, rarely exceeding a day or two. No official record of the evidence and argument is made; each member of the Board makes his own notes. The parties rely on surveys prepared by the Pay Research Bureau, which have, of course, been made available to both parties. Needless to say, each of the parties presents its own views of what inferences are to be drawn from the surveys, and each may, and sometimes does, present additional surveys. In a number of instances in which the tribunal considered that additional material should be forthcoming, it has instructed the parties to request the Pay Research Bureau to prepare such material and submit it to the parties, who would then be in a position to present it to the tribunal.

The most common items that have been referred to arbitration and determined in arbitral awards concern rates of pay (including premium pay for overtime, pay increments, acting pay, pay for travelling time, and severance pay); hours of work (including the scheduling of shifts and days of rest); and vacations. Leave entitlement of various sorts has also been dealt with, including education leave, attendance at seminars and conferences, and leave for career development. In a few instances 'dirty work' or 'hazard-pay' allowances have been provided for.[78]

As we noted in Chapter 4, quite a number of items that have been referred have been held not to be matters within the jurisdiction of the Arbitration Tribunal (and now the PSSRB). One cannot avoid the suspicion that at times the officers of the bargaining agent concerned were aware that some of the items were not arbitrable; they included them in a reference either because they were not disposed to resist pressure from the membership or from a vocal group in the membership, or in order to focus public attention on what they regarded as unnecessary legislative restrictions on the scope of arbitration.

The nature of the decision making in the arbitration process has certain unique qualities. Speaking from his experience under the PSSRA, Leon Mitchell has observed:[79]

> The deliberations in an interest arbitration reflect a search for a rationale rather than a judicial analysis of the facts presented. The objective is to determine what is "fair and reasonable" rather than what is judicially proper. . . . that is to say the arbitrator is to be judicious rather than judicial.
>
> I submit that the reference to arbitration [of an interest dispute] is not for a judicial determination but rather for a pragmatic, rational decision as to what the parties should find to be mutually acceptable. . . . I submit that the best test is a pragmatic one, namely, what will ensure that arbitration as an instrument for resolving disputes will be seen . . . as "legally enforceable conciliation" rather than the determination as to which party is right or wrong.

Section 71 of the PSSRA provides that the decision of the majority of the division of the PSSRB hearing a request for arbitration is the decision of the Board[80] in respect of any matter in dispute; but if a majority of the Board's members cannot agree, the decision of the chairman of the division (the permanent member of the Board) determines the matter in dispute. The award is to be signed by the chairman, and "no report or observations thereon shall be made or given by" any other member. Although recorded decisions do not disclose the instances in which there may have been a dissent from the conclusion reached by the majority or instances in which a majority of the members could not agree, it would appear that in the vast majority of cases, the awards were unanimous.

The PSSRA provides in section 75 that "Where in respect of an arbitral award it appears to either of the parties that the Board has failed to deal with any matter in dispute referred to it, such party may, within seven days from the date the award is rendered, refer the matter back to the Board, and the Board shall thereupon deal with the matter."[81]

Subsection 71(3) of the PSSRA requires that an award be made in a form that may be read along with any collective agreement that the parties have entered into and "as will enable its incorporation into and implementation by regulations, by-laws, directives or other instruments that may be required to be made or issued by the employer or the relevant bargaining agent in respect thereof." Reasons for an award are rarely given.[82] Where an award is made and an agreement has been entered into, the award and the agreement are the instruments that govern the relationship between the parties for their duration.

Where a collective agreement stipulates that one of its provisions may be varied or amended during its lifetime, the PSSRA declares in subsection 57(3) that the parties are free to make changes in the agreement, except for a provision relating to its term. On the other hand, the Act does not authorize the parties to revise or amend any provision of an arbitral award by mutual consent. To meet situations that cannot be foreseen or other special conditions, section 76 empowers the Board, on joint application of the parties, to alter, amend or vary an award.[83]

'Non-Conventional' Arbitration

Section 89 of the PSSRA provides that:

> Where at any time before a conciliation board has made its report the parties so agree in writing, a recommendation made by a conciliation board is binding on the parties, subject to and for the purposes of this Act, and shall be given effect to accordingly.

An agreement of this sort would enable the parties, in effect, to establish an arbitration board of their own choosing. However, there has been no instance since the legislation came into force in which resort has been made to this provision.

There have been four instances in which a dispute has been referred to arbitration by agreement of the parties outside the provisions of the PSSRA. In each of these instances, the dispute-resolution process specified by the bargaining agent for the bargaining unit concerned was reference of the dispute to a conciliation board. In one of them, however, the dispute in question had resulted in a strike during the term of the collective agreement, a time at which the conciliation-board provision of the Act does not apply. In the three other cases, a conciliation board had been appointed, but failed to resolve the dispute; in two of these situations the employees had engaged in a strike.

The first reference of a dispute to arbitration, outside the provisions of the PSSRA and by agreement of the parties, occurred in 1972. The dispute involved air-traffic controllers. The parties agreed in writing to refer two items to Dr. Noël Hall as sole arbitrator; he had acted as mediator and tried to resolve the dispute after a strike occurred. The two items were hours of work for operating employees and salaries; it was stipulated, however, that Dr. Hall was not to "make a salary award of less than 6%, 5 1/2% and 5% as contained in his settlement proposal of January 26, 1972." In the agreement to refer these matters to arbitration, the parties accepted the conditions that they would be bound by the award to be rendered and would execute a collective agreement incorporating the award. They also stipulated that, in rendering an arbitral award, Dr. Hall was to consider the factors listed in section 68 of the PSSRA, and that the award was not to provide anything excluded from the scope of collective bargaining under subsection 56(2) of the Act.

A dispute between the Council of Postal Unions and the employer resulted in a strike in 1974. During the course of that strike, which occurred when the collective agreement was in force, Eric G. Taylor was appointed a mediator to assist the parties in reaching agreement. The parties ultimately agreed that one of the issues they could not resolve, "governing mechanization and technological changes, which have been implemented and which are scheduled to be implemented in the Post Office Department", was to be referred to Mr. Taylor.[84] His terms of reference required that he was to

> ...hear, resolve, or decide upon the procedure for resolving such other matters arising out of this dispute as are in his discretion, considered appropriate for reference to him, and his decisions shall be consonant with the rights and obligations of the parties under the PSSRA and under their collective agreement.

In 1976 employees in the aircraft-operations bargaining unit, then represented by PIPS, engaged in a lawful strike, following the failure of a conciliation board to resolve their dispute with the employer. The dispute was ultimately referred to Mr. Justice Emmett Hall, by agreement of the parties. Nine items were referred, including rates of pay. The agreement to refer stipulated that the report of the third party would be binding on the disputing parties, but was to be subject to approval by the

Anti-Inflation Board. The bargaining agent undertook that in its presentation to the third party, it would take the position that the employees concerned *were entitled* to special consideration under the "Anti-Inflation Regulations", and the employer undertook that in its presentation, it would concede that the employees *might be entitled* to such consideration. The award of the 'third party' was rolled back by the Administrator, and the latter's decision was upheld successively by the Anti-Inflation Board and by the Anti-Inflation Tribunal. The bargaining agent applied to the Federal Court of Appeal for review of the decision of the Anti-Inflation authorities. The Court directed that the matter be reconsidered by the Administrator, but the latter confirmed his original decision.

A second dispute involving the aircraft-operations unit was submitted to arbitration, by agreement of the parties, in 1978. PIPS had, in the meantime, been replaced by the Canadian Union of Professional and Technical Employees as bargaining agent for this unit. After a conciliation board had been appointed and had resolved most of the issues in dispute, the parties agreed to refer to Mr. Justice Hall, as "a Special Mediator", two items: rates of pay and the duration of the collective agreement. The agreement provided, in part, that the Special Mediator would make recommendations on rates of pay as of fixed date, and that these recommendations would be binding on the parties. In doing so, the Special Mediator was to consider himself bound by the provisions of section 68 of the PSSRA. The parties agreed to adjourn the proceedings before the conciliation board pending the report of Mr. Justice Hall. However, the conciliation board was to remain seized of the remaining items in dispute.

One instance of arbitration, outside the provisions of the PSSRA, was the result of special legislation, rather than an agreement of the parties. In the fall of 1978, Parliament enacted back-to-work legislation, the Postal Services Continuation Act,[85] with a view to terminating a strike of members of the Canadian Union of Postal Workers.[86] The bargaining agent had opted for reference to a conciliation board as the applicable dispute-resolution process, and a lawful strike had begun when the legislation was passed. The *Minister of Labour* was empowered to appoint a mediator-arbitrator to try to mediate all matters still remaining in dispute that had been included in the terms of reference to the conciliation board which had initially sought to resolve the differences between the parties, and to bring about agreement between the parties. The mediator-arbitrator was directed, failing success in these attempts, to make a binding arbitral award concerning the items in dispute. The jurisdiction of the mediator-arbitrator was limited by certain provisions of the PSSRA, including the guide-lines in section 68, and those provisions limiting the jurisdiction of a conciliation board.[87] In addition the Anti-Inflation Act and the guide-lines established on the basis of that Act were made applicable to the "first year" of any agreement or award that might be entered into or made on the basis of the back-to-work legislation.[88]

An Evaluation

Critics of arbitration as a dispute-resolution process for public services raise a number of issues that call for discussion, and we must now proceed to examine them. Some of these issues can be discussed in an empirical setting. With others, one can do no more than provide some information from which the reader can draw his own conclusions. In some instances the criticism expresses a point of view with respect to which there is no consummate answer save, perhaps, that the realities of the situation offer no satisfactory alternative.

Allocation of Resources

A philosophical objection to arbitration of interest disputes in the public services is that "interest arbitration is inimical to a basic precept of political democracy, namely, that authoritative political decisions should be reached by government officials who are accountable to the public. Arbitrators are not accountable to the public." Where the dispute involves financial matters, that is, salaries and the like, decisions of arbitrators "not only . . . redistribute resources within government, both budget dollars and managerial authority, but they also affect the cost of government, taxes, and the quantity and quality of public services. When decisions affecting resource allocation are imposed on the body politic by arbitrators, both government officials and members of the public are deprived of responsibility and influence."[89]

That binding arbitration has an impact on the allocation of resources is indisputable. However, collective bargaining in itself affects the allocation of resources:[90]

> ...every agreement between a public employer and a trade union may have a direct and immediate impact on government policy and not only in the area of collective bargaining. If one group of employees succeeds in negotiating a settlement that gives its members a large increase, the policy-making organs of the governmental institution involved must decide whether there is to be an increase in taxes or whether the increase to that group is to be offset by lower increases to another group or by a curtailment of ongoing or contemplated programs.

Without embarking upon a theoretical disquisition on the validity or invalidity of these points of view, the fact is that Parliament, in its wisdom, has seen fit to make arbitration an appropriate dispute-resolution process. However, as we indicated above, under the PSSRA, in so far as the allocation of resources is concerned, when the PSSRB makes an award, it is required to take into account certain factors, especially the factor of comparability with "conditions of employment in similar occupations outside the Public Service".[91] The Act, therefore, has made a policy declaration regarding allocation of resources.[92] This should go some way to answer those who are critical of arbitration on the ground here under consideration. In addition Parliament always has overriding authority to reject an award by the enactment of appropriate legislation, although it is improbable that such a step would be taken except, perhaps, in the most extraordinary circumstances. Parliament did, however, take this step in enacting the PSCRA as one of the measures designed to curb the critical inflationary situation in the summer of 1982.[93]

Is Arbitration Antithetic to Collective Bargaining?

Although some observers maintain that arbitration is antithetic to collective bargaining, a growing number of practitioners have come to a contrary conclusion. In a study prepared for the Task Force on Labour Relations, the author stated[94] that although his observation of negotiating experience in other jurisdictions was by no means comprehensive and his conclusions could only be conditional,

> Nevertheless the experience examined would seem to make significant inroads into the position that arbitration will destroy collective bargaining negotiation. That is plainly not the case. The substitution of a form of interest arbitration does affect both the underlying power relationships and the conditions for genuine

negotiation but there is little evidence to support the conclusion that arbitration does attenuate or subvert collective bargaining in any significant degree. Indeed, there are clear indications that arbitration can create a situation which will invoke the processes of concession and compromise.[95]

The charge of escapism

Closely related to the criticism of arbitration just discussed is the objection that either government officials or officers of bargaining agents or both may resort to arbitration to avoid responsibility for making the compromises that are an essential part of the bargaining process. The claim is made that resort to arbitration becomes a face-saving device behind which employers or bargaining agents could not seek shelter if the ultimate sanction were a strike or lock-out or the threat of either action. On the one hand, referring a dispute to arbitration may absolve members of the management bargaining team of the onus of agreeing to terms and conditions unpalatable to their political superiors. On the other hand, as far as union officials are concerned, it has been said that "Pressing matters to arbitration may be one way to convince the rank and file that the leadership is doing all in its power to achieve results. With strikes outlawed (or not feasible for a weak union), arbitration becomes the vehicle to express union militancy."[96]

It is impossible to ascertain the extent to which 'escapism' of this sort has affected the bargaining process in the federal public service in those instances where the bargaining agent has opted for arbitration as the dispute-resolution process. Human nature being what it is, there have been, no doubt, some cases in which this attitude has led one or other of the parties to refer to arbitration (or to allow the other party to refer to arbitration) a dispute that might have been resolved through mutual agreement if resort to a strike had been a permissible process. Some light may be cast on this point by considering, as appears below, the number of agreements that have been reached without reference to arbitration and the fact that[97] "in many disputes which were actually resolved by arbitration, the number of issues on which the Tribunal arbitrated was lower than that which it was originally requested to arbitrate as a result of some having been settled by negotiation between the union and employer." In any event, a reference to arbitration is not without risk to each of the parties. Where arbitration is a mandatory process, the parties will have divergent expectations of what the award should be. Uncertainty about the extent to which the award will be in accord with their respective expectations may tend to encourage them to settle their dispute through collective bargaining.[98]

That there may be some 'holding back' by one or both parties if the end process is arbitration, is undeniable.[99] However, in any comparison of the relative merits of arbitration with the situation where the strike is available for the resolution of a dispute under the PSSRA, one must take into account that 'holding back' is likely to occur under either of the two processes for dispute resolution provided for by that Act. As we shall see below,[100] before there can be resort to a lawful strike, the bargaining agent must request that a conciliation board be established and a report be made by that board, setting out its findings and recommendations concerning the matters referred to it. If a party is disposed to 'hold back', it may well do so where a dispute is referred to a conciliation board, just as it may where the dispute is referred to arbitration. Indeed, under the first-mentioned process, there is even likely to be what we may describe as a 'double hold-back'. This may occur before a dispute is referred to a conciliation board in the hope that a party will gain support from that board's report. It may also occur at a later stage, after the conciliation board has reported, in the expectation that something more may conceivably have to be conceded when the parties are seeking to resolve their dispute in the post-conciliation-board bargaining, either before or after a strike has begun.

Has arbitration a 'narcotic' effect?

It is a common criticism of arbitration that it has a 'narcotic' effect on collective bargaining, and that it is habit forming.[101] To what extent does the experience under the PSSRA support this type of criticism? From the coming into force of the legislation until 1 September 1981, 701 collective agreements were entered into or arbitral awards were made for bargaining units for which arbitration was specified as the dispute-resolution process. Reference to arbitration was made in 257 instances, that is, 36.6 per cent. Awards were issued in 178 cases, that is, 25.3 per cent of the agreements or awards in this class and 69.2 per cent of the cases referred.[102] No award was made in eighty cases, that is, 31.1 per cent of the cases referred, because a settlement was arrived at before an award was issued and, in some instances, before the reference was assigned to a division of the Tribunal/PSSRB for hearing. In twenty of these cases, the settlement was reached with the assistance of a conciliation officer or mediator.[103] It is evident, then, that in the references where no award was made, the reference created a crisis atmosphere that led to a settlement of the dispute by agreement.

It is bargaining agents for units in the scientific and professional category that have resorted most frequently to arbitration; they account for almost 45 per cent of the 178 arbitral awards that have been issued. Bargaining agents for units in the administrative and foreign service category account for about 23 per cent of such awards, and bargaining agents for units in the operational category account for about 15 per cent of the awards. References in the last-mentioned category were chiefly, but not exclusively, for units in which a substantial number of employees would likely have been 'designated' employees performing essential services, who could not engage in a lawful strike.[104] The frequency with which reliance has been placed, in the final analysis, on arbitration may provide some information about the 'narcotic' or habit-forming effect of arbitration. Bargaining agents for seventy-four units have been involved in one or more arbitration proceedings that have culminated in an award. There was one award for each of thirty-six units; there were two awards for each of fourteen units, three awards for three units, four awards for nine units, five awards for seven units,[105] six awards for one unit,[106] and seven awards for four units.[107] The bargaining agents for twenty-nine bargaining units that had resorted to arbitration on one or more occasions have changed their specification for dispute resolution to reference to a conciliation board,[108] but eight of them have again reverted to arbitration.[109]

What inferences may one draw from the foregoing statistics? The vast majority of agreements for units for which a bargaining agent has specified arbitration as the dispute-resolution process were concluded without resort to arbitration. As we shall see,[110] the proportion is considerably higher than the number of agreements negotiated by the parties operating under the other process *without resort to a conciliation board*. As we have already seen, about a third of the disputes in which a reference was made were settled without an award being issued. We have also noted that the number of issues ultimately left to arbitration has often been substantially reduced through the intervention of a conciliator or mediator. We believe it is fair to say that for a great many of the units for which the bargaining agent has specified arbitration, the process has not been addictive. On the other hand, it is obvious that arbitration has become addictive for some units. Indeed, the bargaining agents for several have resorted to arbitration in every, or almost every, round of bargaining. Most of such units fall within the scientific and professional and the administrative and foreign service categories. They are relatively few, however, when we consider the large number of units for which bargaining agents have been certified in these categories.[111] To ascertain the reasons that have led to the situation just described would require a series of comprehensive case studies, and such a project lies outside the scope of this study.

Lack of innovations by arbitrators

It is often said that arbitrators are not innovative, but that they adopt "parasitic criteria of decision ... that derive their sustenance from another ordering process";[112] in other words, they follow the trend established by collective bargaining in areas where the strike is the end process. As far as this head of criticism relates to the impact of arbitration on wage settlements in the federal public service, the situation has been discussed at length in Chapter 8.[113] Let us turn, then, to non-pay issues, of which it has been stated:[114]

> ...it might be assumed that, if the parties are not prepared to settle on terms similar to those in other agreements, it is because one or the other believes that there are particular considerations to support its claim before a Tribunal. Accordingly, one might expect to find on non-pay issues some significant departures from precedent ... there have been few breakthroughs on non-pay issues.[115]

In one study the authors attribute the reluctance of the PSSRB to introduce innovations to the narrow interpretation placed by the Public Service Arbitration Tribunal, and now by the Board, on the provisions of the PSSRA that define the scope of an arbitral award. The limitations on the authority of the Tribunal/Board in the making of an arbitral award have been discussed earlier in this study and need not be repeated here.[116] Certain provisions of the PSSRA exclude from the scope of arbitration matters that are otherwise excluded from bargaining and matters that may not be dealt with in the report of a conciliation board. These provisions do not, in law, place at a disadvantage the employees in a bargaining unit for which the bargaining agent has specified arbitration, when compared with those for whom the reference to a conciliation board is specified. The same limitations apply in both cases, and any cure for any defect alleged to flow from such limitations lies in broadening the scope of bargainable matters. In a strict sense, the problem is not confined to the arbitration process. Again, there is no provision, among those relating to the conciliation-board process, as there is in the case of arbitration, which serves to limit the introduction before such a board of new matters that have not previously been bargained about. Nevertheless, one can scarcely object, on logical or ideological grounds, to the exclusion of such matters from arbitration. In their appearances before a conciliation board, the parties are still seeking an accommodation; 'trade-offs', which may involve new matters, are still in order.

Notwithstanding the foregoing observations, there is no question but that a bargaining unit for which the bargaining agent has specified arbitration operates at a certain disadvantage in bargaining, both in law and in practice, when compared with those that have selected the other process. The limitations applicable to arbitral awards, in subsection 70(1) of the PSSRA, are, of course, more restrictive than those that apply to what may be included in the report of a conciliation board. Indeed, for a number of years, the Tribunal placed a fairly narrow construction on the terms of subsection 70(1), and it is only since 1978 that decisions of the courts and a more liberal interpretation of the subsection by the Board have widened the range of matters that may be treated in an arbitral award.[117] The impression that arbitration is less advantageous than resort to a conciliation board is heightened, to some extent, by the fact that, not infrequently, the reason given in an arbitral award for the rejection of a proposal is that it falls outside the bounds of subsection 70(1). No indication is simultaneously given that such a proposal is also excluded by virtue of subsections 70(2) and (3), although these limitations are equally applicable to the report of a conciliation board by reason of subsections 86(2) and (3).[118]

In addition, as we have seen,[119] the practice that has been followed in the formulation of terms of reference to conciliation boards and the lack of any practicable procedure for ensuring that the recommendations in the reports of such boards conform to the terms of reference, have probably induced the employer, on some occasions, to make concessions on non-negotiable matters. Needless to say, if the Tribunal/PSSRB were to make similar 'concessions' in an arbitral award, the decision would likely be reversed by the courts as constituting an excess of jurisdiction.

It should not be assumed, however, that the limitations on the scope of arbitration have prevented bargaining agents that have opted for arbitration from having embodied in their agreements some terms and conditions of employment that do not fall within the scope of arbitration. Technically, the employer could resist making any concession during bargaining on non-arbitrable matters and could force a bargaining agent that opted for arbitration to enter into an agreement on arbitrable matters only or refer such matters to arbitration, if no agreement were reached. This is not what has, in fact, occurred. Indeed, some collective agreements in this class contain provisions that may even lie outside the limits for bargaining fixed by the PSSRA. In addition PIPS had adopted the practice of not finalizing a collective agreement until after an award was issued. In those circumstances the employer, if it wished to do so, could take the position that the arbitral award, and the award alone, constituted the totality of the terms and conditions of employment applicable to the employees in the bargaining unit concerned. The fact is, however, that some agreements entered into under these circumstances contain provisions on items that are not subject to arbitration. Nevertheless, bargaining agents do experience a sense of frustration when they do not succeed in having the PSSRB approve of conditions that are not subject to arbitration, but to which the employer agreed in a previous round of bargaining.[120]

Time lapse in arbitration proceedings

It is a truism that justice delayed is justice denied. Until the early months of 1978, except for the first two years after the PSSRA came into force, the time that elapsed between a reference to arbitration and the issue of an award was no doubt a source of great irritation to those who were subject to the arbitration process. Over the years from 1971 to 1977, the average elapsed time was somewhat more than 134 days and in some cases a good deal longer. There were probably a number of reasons for the length of time it took to dispose of a reference during this period, including, among others, the need to meet the convenience of the parties in scheduling hearings, inadequacy in the parties' preparation of their presentation, and delays involved in the submission of post-hearing briefs (a practice that, as we have seen, is now less common).[121] However that may be, one other reason was that the Tribunal was not organized to cope with the number of requests submitted to it. The chairman of the

Tribunal and the alternate chairmen served on a part-time basis and, because of the pressure of their other duties and responsibilities, were not readily available to engage in arbitration proceedings.[122] As the result of the reorganization of the Board, following the 1975 amendments to the PSSRA, although some of the persons performing the arbitration function serve on a part-time basis, one full-time member of the Board carries responsibility for administering that function, and other full-time members are available when required. In the last few years there has been a notable reduction in time lapse; the average waiting period had fallen in 1980 to less than ninety days, and in the first eight months of 1981, it was reduced to less than seventy days (Table 22).

To form an accurate picture of the workings of the process, account ought to be taken, not only of the time lapse discussed above, but also of the time taken up in negotiations preceding a reference to arbitration. In other words, one should reckon the time taken by the parties in bargaining until they reach deadlock, as well as the time that elapses between the reference to arbitration and the issue of the award. The timing of a reference to arbitration rests in the discretion of the parties alone, and delays attributable to the parties ought not to be ascribed to the arbitration process itself. In any event, such delays are not peculiar to arbitration proceedings; similar delays occur under the other dispute-resolution process as well. The request for the establishment of a conciliation board is invariably made after the parties have reached an impasse in bargaining. Here also, in practice, the timing of the request rests with the parties. The time lapse between the request for the establishment of a conciliation board and the release of the report to the parties may be shorter than it is with arbitration but, with very few exceptions, there is a further period of bargaining afterwards before an agreement is executed. Indeed, in some instances, as Table 22 shows, there may be a considerable further delay in situations in which an arbitral award has been issued since, before they enter into a collective agreement, the parties may engage in additional negotiations on matters not referred, or perhaps not even referable, to arbitration. These further delays are the responsibility of the parties, not of the Tribunal/Board. However that may be, as appears from Table 23, the fact is that the average elapsed time for the negotiation of a collective agreement under one dispute-resolution process is not substantially different from that under the other.

One of the factors that may have contributed to the length of the bargaining process that precedes a reference to arbitration is that by subsection 72(2), an award may be made retroactive — to the extent to which it is capable of being retroactively applied — to the day on which notice to bargain collectively is given by either party. Practically all awards made so far have provided that they should have effect retroactively to the date of the previous award or to the termination date of the previous agreement, as the case may be.

Reasons for decisions in arbitral awards

The failure of the Tribunal/Board to give reasons for its awards has been regarded in some quarters as lessening the credibility of the arbitration process.[123] As a general principle, it is obviously desirable that a labour-relations board or arbitration tribunal should give written reasons for its decision. A decision embodying the reasoning that led to a certain conclusion assures the parties that it was not the product of some mysterious 'intuitive' process, but rather was reached by a rational weighing of the evidence and the argument presented by the parties. A reasoned decision also affords to parties to a future proceeding some guidance about the thinking of the tribunal so that they can adapt their presentations to such a proceeding either by relying on the reasons given or by seeking to persuade the tribunal that the previous decision was faulty. That the need to give reasons forces the tribunal itself to give more careful thought to its decision goes without saying.[124] However that may be, the applicability of this general principle to arbitral awards made under the PSSRA must be examined in the light of the composition of the tribunal charged with the responsibility of making such awards and of certain provisions of the legislation under which the tribunal operates.

Although the representative members of a panel have generally accepted their assignment as members of the Tribunal/PSSRB as one requiring an exercise of responsibility that goes beyond simple advocacy of the interests of their nominators, nevertheless, as we have seen,[125] representative members in the earlier days sometimes held consultations with the party whose interests they represented. Although the practice is now frowned upon, there is reason to believe that it still occurs on some occasions. Where it does, the arbitration process becomes, in a sense, an extension of the bargaining process, and in such circumstances the giving of reasons for decision may detract from the acceptability of the arbitration process.[126] Another consideration that must be taken into account in connection with the giving of reasons for an award is that subsection 71(1) of the PSSRA forbids a 'representative' member of the Board to make any report or observation respecting the award. In other words, the giving of reasons for dissent is proscribed. Fairness would seem to require that if reasons are given, a dissenting member should be permitted to give public expression to his views.[127]

Although reasons are rarely given, (with the possible exception of a statement that a proposal is rejected because it does not come within the scope of arbitral matters under section 70 of the PSSRA, or that it does fall within that section), there has been a departure from the approach in a few cases. In the 1971 *General Labour and Trades Case*,[128] an alternate chairman of the Arbitration Tribunal stated that while the Tribunal did not think itself obliged, as a general rule, to explain an award, nevertheless, he believed, in that instance, that some observations concerning the thinking of the Tribunal in preparing its award were warranted. He held this opinion because the legislation under which the Tribunal was acting was of recent origin, and the procedures and obligations of the parties in formal collective bargaining culminating in binding arbitration were new to them. In the *Firefighters Case*,[129] the PSSRB spelled out in considerable detail its reasons for an award of rates of pay in excess of the amount permissible by the strict application of the arithmetic formula provided by the "Anti-Inflation Guidelines" established under the Anti-Inflation Act. The Board stated that it was aware that it had no mandate to determine the appropriateness of the pay rates established by the award in relation to any exceptions to the strict application of the "Guidelines" set out in the *Regulations* under the Act. It remarked that the support of the employer might be crucial in persuading the Anti-Inflation Board or the Administrator to allow a pay increase for the firefighters above the arithmetic guide-lines, and expressed the hope that the employer would support the decision of the Board.[130]

In an application to the Federal Court of Appeal to set aside an award of the PSSRB in the *Architecture and Town Planning Case*,[131] PIPS gave, as one of the grounds on which it relied, that "the Board erred in law and failed to observe a principle of natural justice in failing to provide reasons for its determination of an appropriate increase in salary scales." In the course of argument, the Court seemed to indicate that interest-arbitration proceedings are generally something less than an exact exercise and consequently not particularly suited to the giving of reasons. In addition the Court expressed the view that there was no provision in the PSSRA that required the Board, in an arbitration proceeding, to give reasons for its award, and no such requirement could be inferred from the provision of section 68 of the Act. In expressing this view, the Court relied on the decision of the Supreme Court of Canada in *Northwestern Utilities et al.* v. *City of Edmonton*,[132] where Estey J., in delivering the judgment of the Court, stressed the desirability of administrative tribunals giving reasons for their decisions. He went on to remark: "This is not to say, however, that absent a requirement by statute or regulation, a disposition by an administrative tribunal would be reviewable solely by reason of a failure to disclose its reasons for such disposition."

Review of Arbitral Awards

The PSSRA had provided initially that questions of law or jurisdiction arising in connection with matters referred to the Arbitration Tribunal could be referred for hearing and determination, to the PSSRB by the Tribunal itself or by either of the parties. This provision was repealed in 1975, when the functions of the Tribunal were transferred to the PSSRB. In addition awards of the Tribunal were subject to review by the courts; and the same arrangement now holds true for arbitral awards issued by the Board.

Some Concluding Comments on Arbitration

Whatever may be the shortcomings of arbitration as compared with the conciliation-board route, in the eyes of the bargaining agents and their members, it must always be borne in mind that the specification of the process lies in the hands of the bargaining agent for each bargaining unit. The significance of this fact is not lost on the parties. They are aware that if bargaining carried on for a unit that has specified arbitration should prove highly unsatisfactory, the bargaining agent could resort to the conciliation-board route in the next round of bargaining. It is likely, then, that in view of this situation, bargaining agents that have opted for arbitration have been less inhibited in bargaining than they might otherwise have been.

For the same reason the Treasury Board has probably been inclined to bargain more realistically with such bargaining agents than it would otherwise have done. We can only speculate on the extent to which these considerations have an impact on the bargaining process, although it is notable, as appears from Table 8, that the specification for some bargaining units, which was altered from arbitration to reference to a conciliation board, has reverted to arbitration. Indeed, having regard to the decisions of the courts in the *Canadian Air Traffic Control Association Case*, the number of such units is likely to be larger in the future than it has been in the past. Finally, one should not overlook the fact that there are some units that could exert little or no pressure on the employer by means of a strike; for these units, arbitration is the only effective means of resolving bargaining impasses.

The Impact on Arbitration of the Public Sector Compensation Restraint Act

We must now look at the foregoing discussion of the arbitration process under the PSSRA in the light of the Public Sector Compensation Restraint Act (PSCRA). As we noted in Chapters 8 and 9, above, all collective agreements and arbitral awards in the federal public service have been extended by the PSCRA for twenty-four months from the date of expiration of an agreement or award or from the date of the next scheduled increase, where one is provided by such an agreement or award. Since, under subsection 49(2) of the PSSRA, notice to bargain may be given only within the two months before an agreement or award ceases to operate, and since a notice pertaining to any bargaining unit cannot now be given until two months before the PSCRA ceases to have effect for such unit, and since the obligation of the employer to commence bargaining, as required by section 50 of the PSSRA, does not arise until such a notice is given, it follows that there can be no reference to arbitration, at least until that point of time has been reached. What of a situation, however, where, on the basis of section 49 of the PSSRA, a bargaining agent for a bargaining unit had requested arbitration before 29 June 1982, but no award had been made before that date? This is the situation that came before the PSSRB in the *Administrative Services Case*[133] shortly after the PSCRA was passed. The bargaining agent had referred the dispute to arbitration a few days before Bill C-124 was introduced in the House of Commons. Before the reference came on for hearing before the Board, the PSCRA was passed. Immediately afterwards the Treasury Board submitted to the PSSRB that "the matters in dispute between the parties . . . cannot be determined by an arbitration board". The PSSRB thereupon instructed the parties that it would limit its hearing to the question of the duty and the scope of the Board's authority in the circumstances. The Board held that "This arbitration board established pursuant to the provisions of the Staff Relations Act and before the enactment of the Compensation Restraint Act has no authority to issue a binding arbitral award which would alter the terms and conditions of the subject collective agreement including wage rates as contemplated by the Staff Relations Act following the enactment of the Public Sector Compensation Restraint Act on August 4, 1982." In its reasons for decision, the Board drew attention to subsection 72(1) of the PSSRA, which empowers the Board to issue a final and enforceable decision; it declared that in view of the provisions of the PSCRA, which "bestowed on Treasury Board alone the authority to change terms and conditions of the collective agreement which may be amended within the limits imposed by the Compensation Restraint Act," the PSSRB could no longer issue an award that would be binding on the parties.

There is one very small area where the arbitration process may technically be said to survive. As counsel for the Treasury Board noted in his presentation to the Miscellaneous Estimates Committee,[134] the PSCRA "does not prevent a first contract being negotiated"; that is, it does not prevent a collective agreement being negotiated in accordance with the dispute-resolution processes provided for under the PSSRA by a bargaining agent that has been or is certified to represent a unit of employees that has not previously engaged in bargaining. There are a number of small bargaining units of employees of the Staff of the Non-Public Funds, Canadian Forces, which find themselves in this position. The fact is, however, that resort to arbitration for these units would have little, if any, practical value. Their compensation plan can be changed, within certain limits, only by the Treasury Board.

Subsection 70(1) of the PSSRA makes arbitration the process for dealing only "with rates of pay, hours of work, leave entitlements, standards of discipline and other terms and conditions of employment directly related thereto." Having regard to the definition of the term 'compensation' in the

PSCRA, "all forms of pay, benefits and perquisites paid or provided, directly or indirectly, by or on behalf of an employer to or for the benefit of an employee",[135] it appears that only standards of discipline remain as an arbitral matter.[136] The likelihood of resort to arbitration is therefore infinitesimal while the PSCRA remains in effect.

Conciliation Boards

Procedure for Establishing a Conciliation Board

Let us turn now to the other dispute-resolution process provided for in the PSSRA, that is, reference of a dispute to a conciliation board. Here again, the parties meet and bargain and, in many instances, they reach agreement, either completely or on many of the items that are placed on the bargaining table by either of them. It is only if they reach an impasse in bargaining that the process for the establishment of a conciliation board need be invoked. It may be invoked by either party, and under section 77 of the Act, the process is initiated by a request submitted to the Chairman of the PSSRB. As with a request for arbitration, the statute sets a pre-condition: that the parties to collective bargaining have bargained in good faith and have been unable to reach agreement. However, here again, there is no pre-condition that the parties have made every reasonable effort to conclude a collective agreement.[137] There are two other statutory pre-conditions to the establishment of a conciliation board: first, subsection 78(1) of the PSSRA states that no such board may be established until any conciliator who has been appointed by the Chairman of the PSSRB under section 52, at the request of one of the parties, "has made a final report to the Chairman that he has been unable to assist the parties in reaching agreement"; secondly, in view of subsection 79(1), no such board may be established until the parties have agreed on, or the PSSRB has determined, "the employees or classes of employees in the bargaining unit . . . whose duties consist in whole or in part of duties the performance of which at any particular time or after any specified period of time is or will be necessary in the interest of the safety or security of the public."[138]

Under subsection 78(1) of the PSSRA, the Chairman of the PSSRB may decide whether or not he will establish a conciliation board; he may refuse to establish a board where it appears to him, after consultation with each of the parties, that the establishment of such a board is unlikely to serve the purpose of assisting the parties to reach agreement.[139] In view of the public interest in any dispute that comes under the PSSRA, the Chairman of the PSSRB has consistently taken the position that he should not refuse to establish a conciliation board where a party has requested its establishment, even though, on several occasions, the bargaining agent concerned has made representations that a board should not be established. Another reason for the position taken by the Chairman is the fact that in some instances, if he were not to establish a conciliation board, the process for designating 'essential' employees under section 79 of the PSSRA, as discussed below in this chapter, would not likely be completed before the right to strike accrued. In any event, under subsection 78(2), the Chairman is authorized, after notice to the parties, to establish a conciliation board, even when neither of the parties has requested one, "where it appears to him that the establishment of such a board may serve the purpose of assisting the parties in reaching agreement, and that without the establishment of such a board the parties are unlikely to reach agreement". No board has so far been established in such circumstances.

An interesting expedient was adopted in two disputes, one in 1977 and one in 1978, between LCUC and the employer. The PSSRA stipulates that no person is eligible to hold office as a member of a conciliation board who has attained the age of seventy years.[140] The person whom the parties were anxious to have as the chairman of a conciliation board to assist them in their bargaining was William H. Dickie, one of Canada's outstanding mediators, who was ineligible by reason of the age limit. The parties entered into a written agreement, after the bargaining agent had applied for the establishment of a conciliation board, that the application should be withdrawn, and that the Chairman of the PSSRB should establish a mediation panel according to the procedures provided by the PSSRA for the establishment of a conciliation board. The matters on which the panel was to report its findings and recommendations were to be limited to those that would be included in the terms of reference to a conciliation board. The agreement entered into on 14 July 1978 provided as follows:

> In the event that the mediation panel should be unable to bring the parties to agreement within the time [prescribed] . . . , the services

> of the mediation panel shall thereupon be deemed to be completed and either party shall thereafter be at liberty to request the Chairman to establish a conciliation board for the investigation and conciliation of the dispute.
>
> The parties undertake, covenant and agree each with the other that the establishment of a conciliation board in the circumstances described above is unlikely to serve the purpose of assisting the parties in reaching agreement and that such application to the Chairman would be made solely for the purpose of ensuring compliance with the provisions of section 78 and subsection 101(2) of the Public Service Staff Relations Act. Accordingly, should the mediation panel be unable to bring the parties to agreement within the time [prescribed] . . . , and should either party thereafter request the Chairman to establish a conciliation board, the parties hereby agree that they will make representation to the Chairman to the effect that he should notify the parties that he does not intend to establish a conciliation board.[141]

The efforts of the mediation panel did not meet with complete success. The parties thereupon did make a formal application for the establishment of a conciliation board, and the Chairman of the PSSRB notified the disputing parties that he did not intend to establish such a board. On both occasions the parties succeeded in resolving their differences in subsequent bargaining without resort to a strike.[142]

A conciliation board is a tripartite *ad hoc* tribunal; one member is nominated by each of the parties, and the two nominees then select a third person, who is ready and willing to act as chairman; all three members are appointed by the Chairman of the PSSRB on the basis of section 80 of the PSSRA. If the two nominees cannot agree on the selection of a chairman within five days after the second of the two has been appointed, the chairman of the conciliation board is appointed by the Chairman of the PSSRB on his own initiative.

Terms of Reference of a Conciliation Board

As soon as a conciliation board is established, the Chairman of the PSSRB is required, under section 83 of the PSSRA, to deliver to the conciliation board its terms of reference, setting forth the matters on which the conciliation board is to report its findings and recommendations. The Chairman may, either before or after the conciliation board reports, amend the statement by adding to it or deleting from it any matter he deems necessary or advisable in the interest of assisting the parties to reach agreement.[143] The PSSRA not only imposes limitations on the scope of bargaining under that Act, but subsection 86(2) also declares expressly that the limits on bargaining apply to any recommendations in a report of a conciliation board. In addition subsection 86(3) states: "No report of a conciliation board shall contain any recommendation concerning the standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees." In view of these provisions, the practice under the Act has been to require the parties to appear before the Chairman of the PSSRB to make representations regarding any matter, in the request for the establishment of a conciliation board or in the response made by the other party, that either party alleges is not one on which a conciliation board is entitled to report. The terms of reference delivered to the conciliation board by the Chairman of the PSSRB are, therefore, in effect, important rulings on the scope of bargaining.[144]

The question of whether the Chairman's function, in relation to terms of reference, is 'purely administrative' (in which event he is required to refer to the conciliation board every matter that is raised by either party) or is 'quasi-judicial' (in which event he is entitled to rule on the referability of any matter objected to by either party) has come for attention on a challenge by CUPW. The challenge was rejected. Mr. Justice Dubé of the Federal Court held[145] that in view of the restrictions on the scope of bargaining contained in the PSSRA, "if the [conciliation] board recommended measures which contravene the . . . restrictions, these recommendations would not be implemented. It is in this sense that the Chairman must see that he refers to the [conciliation] board only matters which it can deal with effectively."

Although, strictly speaking, the terms of reference ought to be limited to issues that fall within the scope of bargaining under the PSSRA, nevertheless, it is a fact that events from time to time force bargaining beyond the scope of the law. As we noted in Chapter 4, the Chairman of the PSSRB has developed a practice of referring to a conciliation board proposals that go beyond the scope of bargaining permitted under the Act, subject to a caution that the report of the conciliation board should respect the limitations imposed by the Act. This caution has not always been observed, and the practice has even encouraged the presentation of minority reports making recommendations on non-bargainable matters.[146] Some recommendations of this sort have, in fact, been incorporated in some collective agreements.[147] As we commented earlier, the wisdom of this practice may be questioned in the light of subsequent events. The Act does provide, in subsection 86(4), that after a conciliation board has reported its findings and recommendations, the Chairman of the PSSRB may direct it to reconsider, clarify or amplify its report or any part of it, or to consider and report on any matter added to the terms of reference. If a conciliation board has exceeded its mandate, it would be possible for the Chairman to direct that board to reconsider its report. However, contrary to the formula that is to be found in many other labour-relations statutes in Canada,[148] the report of a conciliation board under subsection 86(4) of the PSSRA "shall be deemed to have been received by the Chairman notwithstanding that the reconsidered report . . . has not been received by him." Since, as we shall see,[149] the right to strike accrues seven days after the report is received, the timing of the original report is significant, and reconsideration would have little effect on the situation. Consequently, little would be gained by the PSSRB's Chairman directing a conciliation board to reconsider its report, especially after it has been made public, even if the board had made recommendations on matters excluded from its terms of reference.

The Nature of the Conciliation-Board Process

According to subsection 84(1) of the PSSRA, the function of a conciliation board is to "endeavour to bring about agreement between the parties in relation to the matters set forth in the statement," that is, the terms of reference delivered to it by the Chairman of the PSSRB. Subsection 86(1) of the Act provides that the conciliation board must report its findings and recommendations to the Chairman of the PSSRB within fourteen days after it receives the terms of reference, but this period may be extended either by agreement of the parties or at the discretion of the Chairman. An extension on the initiative of the Chairman is generally granted only after he has consulted with the disputing parties as well as with the members of the conciliation board. In practice, if the parties reach agreement, the report of the conciliation board may, and usually does, record the points of agreement. Sometimes the parties are in agreement, or they may have indicated generally to the conciliation board concessions which they are prepared to make, but to which they cannot openly admit; they still need the support of a board recommendation to help them 'sell' a proposition to their constituents. The conciliation board's report thus serves a very important interest of the parties. If there is a complete impasse on any matter, the board must make its own assessment of the situation and report its findings and recommendations.

In practice, the members of a conciliation board usually commence their work by holding a more or less formal hearing at which the representatives of the parties make their presentations and have an opportunity to reply to the other side. Following these hearings, the members of the conciliation board confer with each of the parties separately. Each chairman of a conciliation board has his own approach to the mediation phase of the board's operations. Some chairmen interview each of the parties in the presence of only the board member nominated by that party. Some rely solely, or primarily, on communicating with a party through that party's nominee on the board. Some interview the parties by themselves. The problem is to gain the confidence of each party, obtaining from each an indication of that party's real position, as distinct from its public position, and attempting to reduce the differences between the parties without violating confidences. If the board is successful in its attempts to achieve these goals, it will bring about agreement between the parties. If it is unsuccessful, it will make a report setting out its findings and recommendations, in the hope that the reasonableness of the report will bring about a settlement or bring the parties closer to a settlement. It has been suggested in some quarters that through its attempt at mediation, a conciliation board may actually disqualify itself as an impartial agency from making a value judgment on the proposals of the parties. This is the view held by some who favour the fact-finding approach.[150] However, there does not appear to be any serious objection in Canada to the principle incorporated in Canadian legislation.

The decision of a majority of the members of a conciliation board is declared by subsection 84(5) of the PSSRA to be the decision of the conciliation board, but minority reports are permitted. The report of a conciliation board is not binding. However, as we pointed out earlier,[151] where, before a conciliation board has made its report, the parties so agree in writing, a recommendation made by a conciliation board may be made binding on the parties. The Chairman of the PSSRB is required by section 87 of the PSSRA to cause a copy of the report to be sent to the parties immediately, and he may cause it to be published in such manner as he sees fit.[152]

The PSSRA provides in subsection 101(2) that where the dispute-resolution process applicable to a bargaining unit is reference to a conciliation board, and a conciliation board has been established, the employees in the bargaining unit concerned are prohibited from engaging in a strike until seven days have elapsed after the report of the conciliation board has been received by the Chairman of the PSSRB. The purpose of this delay is to permit further bargaining to take place, having regard to the recommendations in the conciliation board's report.[153] A strike rarely occurs immediately on the expiration of the seven-day period.[154] The time lapse between the submission of the report of the conciliation board and the commencement of a strike has ranged from seven to sixty days, with the median point at about fourteen days. There is a further restriction on the right to strike. This restriction affects some employees in a bargaining unit for which the bargaining agent has specified reference to a conciliation board as the dispute-resolution process. The Act declares in paragraph 101(1)(*c*) that "No employee shall participate in a strike . . . who is a designated employee." Indeed, as we pointed out earlier, no conciliation board may be established until the designation process has been completed.[155]

Evaluation of the Conciliation-Board Process

For the period to 1 September 1981, 170 agreements were entered into for bargaining units for which reference to a conciliation board was specified as the dispute-resolution process. Reference to a conciliation board was made in 104 instances (61.11 per cent) in connection with these agreements. In thirty-one of these cases (29.8 per cent), the request was withdrawn when the parties succeeded in reaching agreement. Conciliation-board reports were issued in seventy-two cases, 42.35 per cent of the agreements in this class and 69.23 per cent of the cases referred. Of the instances in which the conciliation process reached the report stage, thirty-nine related to units in the operational category, seventeen to units in the technical category, eight to units in the professional and scientific category, five to units in the administrative and foreign service category, and three to units in the administrative support category. As to the frequency of resort to a conciliation board that led to a report, there were thirteen references involving units in the Post Office[156] and six each involving the air-traffic-control unit and units in the ship-repair occupational group.[157] In the remaining cases, the frequency of resort to a conciliation board was, of course, much less.[158] On the whole, it is apparent that resort to a conciliation board has occurred more often than has resort to arbitration.[159]

Some representatives of bargaining agents, especially those who believe that a strike, or threat of a strike, is a highly effective mechanism for bringing pressure to bear on the employer, consider that resort to a conciliation board is a much more expeditious means of achieving a settlement than resort to arbitration. As appears from Table 24, the average elapsed time between the submission of a request for the establishment of a conciliation board and the submission of the report of such a board to the Chairman of the PSSRB was considerably less, until 1976, than the time that elapsed between a request for arbitration and the date when an award was issued. In recent years the time lapse involved in the conciliation-board procedure has lengthened considerably, in sharp contrast to the situation under the arbitration option. Again, in a great many instances, the time lapse between the release of the report of a conciliation board and the date when the parties entered into a collective agreement was shorter than the time between the issue of an award and the execution of an agreement. Nevertheless, as Table 23 discloses, there has not been any significant difference in elapsed time under either process between the commencement of negotiations and the date when a successful conclusion of the dispute has been reached.

Finally, it should be noted, as will appear in a later section of this study, that strikes, either total or partial, followed the presentation of a conciliation-board report by employees in fourteen bargaining units.[160]

The Impact of the Public Service Compensation Restraint Act on the Conciliation-Board Process

The discussion earlier in this chapter[161] about the impact of the PSCRA on arbitration applies equally to the entitlement of the Chairman of the PSSRB to establish a conciliation board. In the *Programme Administration Case*, the Chairman of the PSSRB said that he was in accord with the views expressed in the *Administrative Services Case*, where the Board had considered whether it had jurisdiction to entertain a reference to arbitration during the restraint period. He held that "the Chairman of the PSSRB is without authority to establish a conciliation board pursuant to section 78 of the PSSRA during the period that the PSCRA remains in force."[162] The decision in the *Programme Administration Case* dealt with a situation where the parties were bargaining for the *renewal* of an agreement. It does not consider the situation where a 'newly certified' bargaining agent is bargaining for a first agreement. It may be that in those circumstances, there is no bar to the establishment of a conciliation board. However, since the compensation plan for the bargaining unit concerned is under the unilateral control of the Treasury Board, there would be little, if any, value in a bargaining agent seeking to have a dispute referred to a conciliation board, and it appears extremely unlikely that resort will be made to this process while the PSCRA is in effect.

Strikes[163]

Although employees in the federal public service may engage in a lawful strike[164] in the circumstances to be discussed below, the PSSRA, in subsection 101(1), prohibits strikes by certain employees at any time. These are the following:

- Employees in a bargaining unit for which a bargaining agent has not been certified by the PSSRB
- Employees in a unit for which the process for dispute resolution is referral of the dispute to arbitration
- Designated employees, that is, employees in a bargaining unit for which the bargaining agent has specified referral to a conciliation board as the dispute-resolution process and concerning whom the disputing parties have agreed or the PSSRB has determined that the continued performance of their duties is necessary in the interest of the safety or security of the public.[165]

In addition employees in a bargaining unit for which the bargaining agent has specified referral to a conciliation board as the appropriate dispute-resolution process are forbidden by subsection 101(2) to strike, both during the time that a collective agreement applicable to their bargaining unit is in force and after the expiration of the agreement until the conciliation-board process has been 'completed'.[166] As to the latter provision, if the Chairman of the PSSRB establishes a conciliation board, no strike may lawfully take place until seven days have elapsed from the time when he has received the report of the conciliation board.[167] If the request for the establishment of a conciliation board is denied by the Chairman of the PSSRB, the right to strike accrues as soon as the parties are notified of the denial.[168] The *Finkelman Report* recommended[169] that since a bargaining agent, on certification, acquires the exclusive right to represent the employees in the bargaining unit and to bind them by a collective agreement, there should be a further limitation on the right to strike. The employees should not have the right to strike unless and until the bargaining agent has duly called or authorized a strike and has filed with the Secretary of the Board written verification of such call or authorization.

The PSSRA does not, in express terms, confer the right to strike on employees in a bargaining unit if the bargaining agent for that unit has opted for reference to a conciliation board as the appropriate dispute-resolution process.[170] It does so implicitly in section 101 by prohibiting strikes in certain circumstances and during defined periods. Any action of employees that falls within the term 'strike' as defined in the Act and that is not prohibited is therefore a lawful activity of an employee organization, and an employee may participate in such action under section 6 of the Act. That section declares the rights of employees and reads, in part, as follows: "Every employee may . . . participate in the lawful activities of the employee organization of which he is a member."[171] The term 'strike' is defined in section 2 of the Act as including "a cessation of work or a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output."[172]

Since the PSSRA came into force and until 1 September 1981, twenty-seven lawful strikes have occurred, eight of them by employees in the Post Office (Table 25). The strikes involved employees in fourteen bargaining units. The duration of the strikes has ranged from one day to 101 days, with the median point at twenty-one days. With few exceptions, the longer ones have either been rotating strikes,[173] or strikes in which a relatively small number of employees in a unit took part.[174] The employees in the latter group were engaged in duties which, though not necessary to the safety or security of the public, were nevertheless of a nature that, if discontinued, would cause major inconvenience or cost to the public. A strike in 1980, by employees in the clerical and regulatory unit, which continued for 30 days, did cause major inconvenience, even though not all employees in the unit were on strike at any one time. In large part this was because employees in other units, who were not entitled to strike at that stage, refused to cross picket lines established by the striking employees.

The constitutions of the majority of the bargaining agents do not contain any provision dealing with the authority of the organization to call a strike or establishing what steps must be taken to obtain the endorsement of the membership to call a strike. In practice, however, these organizations, when they engaged in a strike, did seek endorsement of the membership by means of a strike vote. A regulation enacted by the Board of Directors of PSAC provides for a secret ratification vote (by mail, where necessary) by the members of the bargaining unit concerned, for the purpose of accepting or rejecting a conciliation-board report as a basis for settlement. The regulation calls for the material to be supplied to members in connection with such a vote to make clear to all members "that a vote to reject the conciliation board report is also an authorization to the Executive Management Committee to take a strike vote of that bargaining unit." When a *strike vote* is taken, only members in the bargaining unit who are not 'designated' are eligible to cast ballots. Even if the result of a strike vote favours a strike, such action can only be authorized by the National President, and his authorization must be in writing. If, after a strike has been authorized, the Negotiating Committee recommends acceptance of a later offer of the employer, another secret ballot must be taken at membership meetings convened in each area; only members present at the meetings are eligible to vote. Although the constitution of the International Brotherhood of Electrical Workers, Local 2228, does not contain a strike provision, a policy statement appended to the constitution declares that there is a right to strike. There is no constitutional requirement that a strike vote be taken, but in practice a vote is taken to determine whether the report of a conciliation board is to be accepted or rejected. The ballot used states that if a majority vote is in favour of rejection, it will be treated as authorizing a strike.

On the other hand, the constitutions of three organizations do make provision for the taking of a strike vote. The constitution of CUPW contains elaborate provisions. Its National Executive

Board is required to report to its members and to submit any strike vote by secret ballot through the locals. The first vice-president is placed in charge of organizing preparatory steps and strike structure. A defence fund is established to be used exclusively to provide strike pay to members during a general labour dispute. There are comprehensive provisions requiring all members to participate in picketing. Paid officials are forbidden to receive any salary during a strike, but they are entitled to receive strike pay. It is an offence under the CUPW constitution to impede or act in opposition to a strike. No collective agreement is to be signed unless any charges against members are withdrawn.

Under rules established by each branch of the Canadian Merchant Service Guild, the branch executive board or management committee is instructed to take a strike vote by secret ballot (by mail, if desirable). If a strike is endorsed by 75 per cent of the members, the National Executive Board "shall order such support to the members on strike by all members of the Guild, as they deem necessary and appropriate." If the vote in favour of a strike is in excess of 50 per cent, but less than 75 per cent, the National Executive Board is to "decide whether or not any resources of the Guild are to be utilized in support of the position of the members concerned." The National Executive President and the president of the branch concerned are given joint authority to call a strike in an emergency strike situation, subject to appeal to the National Executive Board. The National Executive President may negate irresponsible strike action in what some members may regard as an emergency situation, where he and the branch president deem it necessary to do so.

The constitution of the Canadian Air Traffic Control Association provides that if a settlement cannot be reached in negotiations for a collective agreement, and if the National Executive and the Negotiating Committee consider that all reasonable means of achieving a settlement through collective bargaining have been exhausted, the President may require all branches to convoke a meeting on three days' notice for the purpose of taking a strike vote by secret ballot. The meetings must be held in two shifts so that all members will be able to attend. If a majority of votes cast are in favour of a strike, "the National Executive may at its discretion, and subject to the legislation governing such actions, declare a strike and fix the date and hour of [its] commencement."

The 'right' to strike conferred by the PSSRA must yield to a higher social goal in some circumstances. Apart from the provisions of the PSSRA that prohibit strikes during certain times and by certain employees, the identification of the 'higher social goal' and the decision as to when it comes into play rest with Parliament in any particular situation. Up to the present time, there have been only two instances[175] in which Parliament has seen fit to remove from a bargaining agent that had opted for reference to a conciliation board as the appropriate dispute-resolution process the right to declare or authorize a lawful strike. One instance related to a strike by air-traffic controllers in 1977,[176] and the other related to a strike by 'inside' postal workers in 1978.[177] The Act required officers of CUPW, the bargaining agent for the employees engaged in the latter strike, to give immediate notice to the unit's employees that the declaration of the strike was invalid. CUPW's National Executive Board resolved to recommend to the employees that they should defy the legislation. Management in the Post Office informed the employees that if they did not return to work, they would be considered to have abandoned their positions, whereupon the National Executive Board recommended that the employees return to work. The president of the Union was indicted and convicted under subsection 115(1) of the Criminal Code for violating the Postal Services Continuation Act. On appeal to the Ontario Court of Appeal, counsel for the president argued that the Postal Services Continuation Act deprived him of the right to "equality before the law and the protection of the law" and was therefore inoperative by reason of subsection 1(*b*) and section 2 of the Canadian Bill of Rights[178] in that it treated postal employees more harshly than other employees. The argument was rejected by the Court, which held that if a statute was enacted for valid federal objectives, it could treat one group of persons differently from another.[179]

In April 1978, in anticipation of the possibility that a federal election would be called that year, Parliament passed the Postal Service Operations Act. That Act amended the PSSRA by providing that the right to strike of the employees in the postal operations unit should be suspended during the election period following the dissolution of Parliament. CUPW was the bargaining agent for the employees in that unit, and a conciliation board had already been established earlier that year in connection with negotiations for renewal of the collective agreement. Parliament foresaw the possibility that the House of Commons might be dissolved on or before the date on which the Chairman of the PSSRB received the report of the conciliation board. If this were to happen, the union would not acquire the lawful right to strike until seven days had elapsed from the date on which the Chairman of the PSSRB received the conciliation board's report, and from the date fixed for the return of the writs at the general election of members to serve in the House of Commons, whichever came later.[180] By that time Parliament could be recalled to deal with a strike.

The PSCRA does not specifically prohibit strikes while it remains in force. However, since under that Act collective agreements and arbitral awards have been continued in force for specified periods, any strike by public servants to whom an extended agreement or award applies would be in violation of the provisions discussed above of the PSSRA.

Lock-Outs

There is no definition of the term 'lock-out' in the PSSRA, as there is in most labour-relations statutes in Canada, and the Act confers no right on the employer, expressly or by implication, to lock out employees for any reason. In view of this situation, can the employer respond in any way to a strike that impedes its operations? This question called for determination by the PSSRB in the *Postal Operations Lock-Out Case*.[181] The employees in the postal operations bargaining unit had engaged in a series of rotating strikes at various points in the postal system.

> Employees at a major terminal would absent themselves on one day or for two days at a time and, immediately on their return to work, employees in offices dependent on the major terminal would go on strike. . . . [T]he Government reacted to this pattern of strikes by adopting a policy of suspending services at what may be somewhat loosely described as the dependent post offices in a geographical area on the same day that employees stayed off work at the major terminal upon which those post offices were dependent.

The bargaining agent filed a complaint alleging that:

> ... the employer...by intimidation, by the actual and threatened use of unlawful lock-outs and/or unlawful lay-offs penalizing employees with loss of wages, has sought to compel its employees who are represented by [the bargaining agent] to refrain from exercising the right given to them under the Public Service Staff

> Relations Act, normally, the right to engage in a lawful strike including the right to do so in a rotating manner. . . .

The Board held that it "must look to the purpose of the action taken by the [Employer]. If the purpose is punitive or retaliatory, it is forbidden. If, on the other hand, the purpose is to continue the operation of the Employer in a practicable manner, it is not a violation of the statute." The Board found that the evidence presented fell short of disclosing such a disregard for the overall needs of the postal service that it warranted a finding that the employer's purpose was malevolent.

In *Public Service Alliance of Canada and Manion et al.*,[182] the bargaining agent filed a complaint alleging that the respondents, the Secretary of the Treasury Board and a number of telecommunications area managers in the Department of Transport had "illegally locked out certain employees in the Radio Operations Group by advising them that they will not be paid for duties performed if they continue a legal strike consisting of a slow down designed to restrict or limit output, and by relieving of their duties and sending home employees that have reported to work." In its decision, the Board stated that it was in agreement with the views expressed in the *Postal Operations Lock-out Case*.[183] Its finding on the facts was as follows:[184]

> ...we are satisfied that the actions taken by the Telecommunications Area Managers were motivated by operational considerations rather than being a tactic designed to coerce the complainant and the employees in the Radio Operations Group to submit to the proposals of the employer with regard to terms and conditions of employment. We would stress that if the Board were to acquiesce to the position advanced by the complainant, it would be tantamount to requiring the employer to accept restricted output and at the same time to finance the strike action called by the complainant and participated in by the non-designated employees in the Radio Operation[s] Group at the expense of the public.

The complaint was dismissed.[185]

The PSSRB's decision in the *Postal Case* was followed in *Professional Institute of the Public Service of Canada* v. *Treasury Board et al.*[186] In this case a number of nurses at the National Defence Medical Centre, who reported for work during the course of a lawful strike, were placed on 'off-duty' status because their services were not required during that period since a large number of patients had been released in anticipation of the strike. In its decision, the Board commented that there appeared to be no legislative authority for placing employees on 'off-duty' status, and that the nurses were, in fact, laid off because of lack of work.

The *Finkelman Report*[187] recommended that provisions be included in the legislation authorizing the employer to lock out employees in the same circumstances and subject to the same limitations as apply in the case of a lawful strike. The *Report* noted that:

> It is unlikely that a public service employer would lock out its employees with a view to compelling them to agree to terms and conditions of employment. However, where employees engage in a rotating strike or in action that does not involve a complete cessation of work, the employer may well regard a retaliatory lock-out of the employees in the bargaining unit to be an effective weapon to minimize the impact of such a strike. There does not appear to be any justification for depriving the employer of this weapon.

Bill C-28 (s. 7) would have given to the employer authority "to suspend for a maximum period of sixty days an employee from the performance of his duties for lack of work because of a strike." Bill C-22 (s. 7) contained a more elaborate provision. It would have empowered the employer "to suspend for a maximum period of sixty days an employee from the performance of his duties for lack of work because of a strike but, subject to any delay required in resuming operations that arises as a result of the nature of the operations from which the employee was suspended, any such suspension shall terminate when the strike terminates." The employees whose services were discontinued in the two cases referred to above were members of the bargaining units in which the employees were on strike. The provisions of Bills C-28 and C-22 would have entitled the employer to suspend employees even in units of which the employees were not on strike. Under subsection 29(1) of the Public Service Employment Act, lay-off of employees for lack of work is subject to regulations made by the Commission. The subsection appears to deal with long-term lay-off, rather than the temporary lay-off of an employee whose services are no longer required for a relatively short period because operations have been interrupted by a strike.

Protection of Essential Services

There are some government services so essential to the public welfare that no civilized community can look with equanimity on the public being deprived of them.[188] Though the federal government was prepared in 1967 to accept the principle that public servants should have the right to strike, it was not prepared to run the risk of having certain essential services disrupted by a strike. One of the most innovative features of the PSSRA was the provision for the protection of some essential services in the event of a lawful strike.[189]

> It must not be thought that essentiality is a self-defining concept. . . . Even given a consensus about the essentiality of an industry, there will be real and honest differences of opinion on the facts of any particular case about the impact of a labour dispute. Frequently these differences will be the product of ignorance: the prediction of harm to the public or to individual members of it will have to be made without the benefit of precedent, without full knowledge of the degree to which service or supply can be maintained during the labour dispute, without knowledge of the availability of substitute services or goods, and without any sure guide to the resiliency of those who are deprived of what is said to be "essential".

The approach to this problem incorporated in the PSSRA was to 'protect' the services performed by employees or classes of employees (referred to in section 2 of the Act as 'designated employees') whose duties, as spelled out in subsection 79(1), "consist in whole or in part of duties the performance of which at any particular time or after any specified period of time is or will be necessary in the interest of the safety or security of the public." The designation principle applies only to employees in a bargaining unit for which the bargaining agent has specified reference to a conciliation board as the appropriate dispute-resolution process. By paragraph 101(1)(*c*) of the Act, persons identified as 'designated employees' are forbidden to strike, and this prohibition applies to them even in circumstances where their fellow employees in the same unit may lawfully engage in a strike.[190]

Process for Designating 'Essential' Employees

In administering the relevant provisions of the legislation over a period of almost a decade and a half since the PSSRA came into force, an impressive model for dealing with essential services has evolved both through the approach of the parties to the issues that have arisen and in the decisions of the PSSRB. The validity of this model has now been set in doubt by the recent decisions of the Federal Court of Appeal and the Supreme Court of Canada in the *Canadian Air Traffic Control Association Case* to be discussed below. However, we believe that a detailed examination of the earlier practice and experience may be of value to students of the problem. Accordingly we propose to analyse the extent to which the parties were able to reach agreement on the classes of employees to be designated, the nature of the duties designated employees were to be required to perform, and the rulings of the Board under subsection 79(1) as matters stood before the decisions of the Courts. We shall then discuss those decisions and comment on their implications for the future administration of the designation concept.

The process whereby employees are designated is prescribed as follows in section 79 (2) of the PSSRA: "Within twenty days after notice to bargain collectively is given by either of the parties, . . . the employer shall furnish to the [Board] and the bargaining agent for the relevant bargaining unit a statement in writing of the employees or classes of employees in the bargaining unit who are considered by the employer to be designated employees." In the *Air Traffic Control Case No. 4* [191] the employer sought to add to the list of designated employees after the twenty-day period fixed by subsection 79(2). The bargaining agent contended that the Board had no jurisdiction to designate additional employees under those circumstances. The objection of the bargaining agent was not sustained. In the *Nurses Case*,[192] the Board applied the principles of the *Air Traffic Control Case* and said that in that case,

> ...the Board pointed out that the purpose of section 79 was essentially to protect the safety and security of the public and goes beyond the immediate interests of the parties. Thus, where there has been an omission on the part of the Employer in its proposals on the designation of employees or classes of employees, regardless of the reason, for the Board to refuse to consider the designation of any additional employees or classes of employees made after the Employer's original statement is filed with the Board or bargaining agent, would defeat the very purpose for which the provision for the designation of employees for the safety or security of the public was included in the Act.

In another case, the *Federal Government Dockyards Trades and Labour Council East Case*,[193] where the employer failed to file the required list within the prescribed period, the PSSRB held that "the time limit specified in subsection 79(2) is directory only. . . . [and] was not intended to be construed as mandatory."

The bargaining agent is afforded an opportunity to file objections to the statement furnished by the employer within a period of time fixed by the PSSRB.[194] Failure to file an objection is taken as agreement that the employees or classes of employees included in the statement are designated employees. If an objection is filed, the responsibility for determining which employees or classes of employees are to be designated falls to the Board.[195]

The administration of the 'designation' process has become complicated for a number of reasons. For an understanding of the problems that have arisen, it is necessary to examine the process in some detail as it passes through its various stages. The staff of the Treasury Board,[196] as the agency responsible for furnishing the list of employees who are proposed for designation by the central administration, must rely on the staff officers of the several departments or agencies where employees in the unit concerned are employed to provide the Treasury Board with the information it needs. It is from information supplied in this way that the Treasury Board compiles the list that it provides to the PSSRB and the bargaining agent. The zeal of staff officers to ensure the continuance of the services furnished by their respective departments and agencies ought not to be underestimated. One gathers the impression that during the early history of the legislation, the staff of the Treasury Board did little more than collate the lists submitted in this fashion without screening them extensively to ensure that the proposed designations properly met the standard set by the PSSRA. As the PSSRB began to issue decisions in designation cases, the principles established in those decisions were communicated to departments and agencies, and the staff of the Treasury Board began to play a more active role in screening information supplied by departments and agencies. However, in the last analysis, departmental and agency views continue to carry great weight in the determination of the final content of the list furnished by the Treasury Board.

The problem is further complicated by the fact that any decision about the classes and number of employees to be designated will depend on several variables, such as the time of year when a strike may take place and the possible length of such a strike. Thus, for example, the supply of heat to certain establishments may be necessary in the winter-time, but obviously not in the summer; some lighthouses may have to be kept in functioning order during the navigation season, but not after that season has ended. Again, the safety or security of the public may not be appreciably affected by a strike that lasts only a few days; the situation may be much more serious if the strike continues for a longer period. In the 1980 *Nurses Case*,[197] for instance, the employer had proposed the designation of a number of nurses in the Correctional Service of the Department of the Solicitor General (the Penitentiary Service). The role of these nurses was "essentially one of keeping the Regional Manager informed of the state of nursing services in the region." The employer had also proposed the designation of a number of nurses whose "major role [was] to act as shift (or area) supervisors." The evidence regarding the nurses in the first group was that their functions had significant influence on the quality of nursing care in the regional institutions. The PSSRB found that there was no initial need for their services in the interest of public safety or security, but that their absence could be a problem "over the long haul", and the Board was "not prepared, at this time, to designate [these] nurses." The major role of the second group was to act as shift (or area) supervisors (essentially, team leaders) who provided a link between staff nurses and professional specialists. The Board reduced the number of nurses designated in this group because, while the evidence suggested that a significant reduction in the number of such nurses "over an extended period of time could adversely affect the quality and professionalism of the therapeutic programs, in the short run the teams could carry on on the basis of their experience with the established programs without the full complement of team leaders."

It is, of course, impossible to forecast, at the time that the designation process is under way, when a strike may commence and, if it does occur, how long it may continue. It is therefore usual for the employer to furnish a list based on the worst possible forecast of events that it may contemplate.

In most instances, in order to preserve its rights, the bargaining agent files a formal objection to the list furnished by the employer immediately on receiving it.[198] Thereafter negotiations take place between the parties, which usually result in an agreement on all, or a good many of, the classes or groups of employees to be designated. The Special Joint Committee on Employer-Employee Relations in the Public Service of Canada expressed the view that "In some circumstances the employer has inflated its list on the assumption that in subsequent bargaining some designations would be lost."[199] In a number of instances where the designation process has dragged on, and the bargaining agent has been anxious to have a conciliation board appointed without further delay, the agent has agreed to the designation of all employees proposed by the employer, or those about whom the parties have been unable to agree at the time. The bargaining agent has made these concessions in order, as it has stated to the Board in withdrawing its objection, to accelerate the process for the appointment of a conciliation board; but the agent has added the reservation that such withdrawal is to be without prejudice to any position it might take in future rounds of bargaining for the bargaining unit concerned or for any other bargaining unit.[200] Such a state of affairs cannot but undermine the credibility of the process.[201]

The *Finkelman Report*[202] recommended that the designation process should commence six months before a collective agreement or arbitral award ceased to operate, and that a degree of flexibility should be built into the process to accommodate the need for changes in, or additions to, the list submitted by the employer as new circumstances came to light. The Special Joint Committee on the *Finkelman Report* recommended a radical alteration in the designation process. It proposed that a permanent list of designated employees in all bargaining units be established and kept up to date without regard to what process had been specified.[203] It is doubtful whether the Committee appreciated the magnitude of the task that would be involved in implementing these recommendations. As we shall see below, a heavy and time-consuming burden already rests on the PSSRB and the disputing parties for resolving problems relating to the units for which the conciliation-board option has actually been specified. The Committee's recommendations would add to that burden the need to resolve similar problems relating to a substantial number of other units. In addition the organization of the public service and the nature of the services rendered are not static; they are constantly in a state of change and development. If permanent lists are to be maintained, they would have to be revised constantly to ensure that they were as reliable as possible. Finally, it is doubtful whether either the bargaining agents or the employer wish to devote attention to the designation process until they must do so when bargaining for the making or renewal of a collective agreement is imminent. The experience over the years has been that frequently the parties do not get down to serious discussions about the list of employees to be designated until shortly before they perceive that an impasse is likely to be reached in their negotiations for making or renewing an agreement. Quite often, when the Office of Mediation Services inquires what progress is being made by the disputing parties and suggests that mediation may be of assistance, the parties reply that the intervention of a mediator would not be welcome at that stage. Nevertheless, it must be admitted that some bargaining agents have indicated their support for the recommendations of the Parliamentary Committee.

When the PSSRB is informed that agreement has been reached, it has treated the matter as one in which no objection has been filed with respect to the employees or classes of employees agreed upon within the time prescribed, or as one in which objection has been withdrawn.[204] In the *Nurses Designated Employees Case*,[205] the position of the Board on this stance was challenged. The bargaining agent of the employees concerned had agreed with the employer in writing on the classes of employees who were designated employees, and the Board had 'endorsed' the agreement. In subsequent proceedings, the bargaining agent sought to have the PSSRB rescind its decision 'endorsing' the agreement. The representative of the bargaining agent submitted that "the Board cannot simply accept the agreement of the parties as to who is a designated employee, particularly in the instant case, where it is apparent that the designations agreed upon were based, not on the fact that the duties of the employees concerned were or could be necessary for the safety or security of the public, but rather on the basis of the health services that they provide to the public." The Board rejected that submission on the ground that because an authorized representative of the bargaining agent had entered into the agreement, the bargaining agent could not repudiate the agreement. In its decision, the Board noted that the agreement had not disclosed the reasons that impelled the bargaining agent to concur in any proposal for designation made by the employer; indeed, there was no obligation on the parties to make such disclosure. The Board was therefore entitled to presume that the criteria set out in section 79 of the PSSRA had formed the basis for the agreement. In any event, the Board held that it had jurisdiction to deal with the matter only where the bargaining agent had entered objection to the employer's proposal, and that the same principle applied where the parties reached agreement after objection had first been made.

At the very outset, the employer took the position that the list to be furnished, after notice to bargain had been given, should be organized by class or job title, and should identify the duties and responsibilities to be performed, rather than setting out the names of the employees who formed a class or occupied a particular position.[206] The reason given for this approach was that "Because of the normal turnover of personnel caused by movement into and out of the Public Service, and reassignments within the Service", it would be preferable to furnish the "name list", that is, the list of the *names* of designated employees, when a conciliation board had been established so that the list would be as reliable as possible.[207] This approach has proved acceptable to the bargaining agents and has become the established practice.[208]

'Agreed' Designations

Any attempt to extract a comprehensive or consistent set of principles relating to designation from an examination of proceedings in which the parties have reached agreement on that matter, or where agreement must be inferred from the fact that the bargaining agent has not objected to the list furnished by the employer, is likely to be a precarious exercise. Different bargaining agents hold different views on how the designation formula should be applied, and the position taken by one bargaining agent is by no means binding or persuasive for another. Again, an employee organization that represents employees in two or more bargaining units may well be impelled by the employees in one unit to take a position that differs from that taken by that organization with respect to another unit. However, it is probably fair to say that some sort of pattern has gradually been emerging. Agreed designations can be grouped under a number of heads:

- Employees the withdrawal of whose services would or might directly affect the physical safety or security of the public
- Employees the withdrawal of whose services would make it difficult or impossible for other employees to perform duties the performance of which is or will be directly necessary in the interest of the physical safety or security of the public

- Employees the withdrawal of whose services would or might directly or indirectly affect the health or 'well-being' of the public and other employees who perform duties that make it possible for the first-mentioned group of employees to carry out their 'essential' duties
- Other services.

Bargaining agents appear to have shown little or no hesitation in agreeing to proposals of the employer to designate employees whose continued performance of duties is or will be necessary to protect the safety or security of the public in what seem to be the most obvious emergency or hazardous situations.[209]

Similarly bargaining agents appear to have shown little or no resistance to designating employees who service equipment or maintain facilities to enable employees in other bargaining units (or non-bargaining-unit employees) to continue to perform duties or to render services that are or will be necessary to protect the safety or security of the public in the most obvious emergency or hazardous situations.[210] There has been general agreement that employees engaged in duties that would ensure the effective operation of Canada's defence forces, the Royal Canadian Mounted Police and the Canadian Penitentiary Service should be designated, sometimes in broad general terms and sometimes by reference to specific duties to be performed or specific services to be rendered.[211]

Certain aspects of federal government services relating to health have generally been regarded by the parties as warranting designation of some employees within the context of the designation formula set out in the PSSRA.[212] Many of the services of the Department of External Affairs have been recognized as pertaining to safety or security.[213] Care of Native people and of persons resident in isolated communities and posts has also been considered, in a variety of ways, an aspect of safety or security of the public.[214] The manning of weather ships in the Pacific Ocean has also been generally accepted as warranting designation.[215]

The suspicion was voiced in the *Finkelman Report* that in some instances, agreements were reached on the designation of certain employees, not on the ground that their duties were necessary to the safety or security of the public, but because the bargaining agents concerned believed that retaining these employees at work would enhance public support of the union during any strike that might take place.[216] The *Finkelman Report* recommended that the practice of designating employees in such circumstances be expressly sanctioned in the legislation, subject to certain safeguards.[217]

Several agreements concerning the designation of employees have included the recognition by both parties that unforeseen situations might arise where it would be impossible to follow the normal course in designating essential employees, and that such situations could be dealt with only by extraordinary methods. The parties agreed in a number of cases that when certain emergencies arose, all, or a specified group of, employees not otherwise designated would be considered designated employees or would be recalled to work when an emergency was declared by specified administrative authority.[218]

Not infrequently, in the past, the agreement of the parties about designation has contained specific conditions under which the duties of designated employees were to be performed. Whether this practice is likely to be continued in the future is now in doubt, in light of the decision of the Federal Court of Appeal and that of the Supreme Court of Canada in the *Canadian Air Traffic Control Association Case* discussed below.[219]

The imposition, in agreements between the parties, of conditions in which designated employees may be required to perform their duties in the event of a strike was indirectly endorsed by the PSSRB in the *Electronics Designated Employees Case No. 1*.[220] Counsel for the bargaining agent had proposed, in essence, that the Board "should direct the Employer to instruct employees in other bargaining units and even employees and persons not included in any bargaining unit, that they must make limited use of the equipment serviced by technicians who have been designated." In rejecting this proposal, the Board said:[221]

> *In the absence of an agreement* on a formula such as is proposed by the Bargaining Agent, we fail to see what authority the Board has to issue such a directive. Our jurisdiction . . . is confined to determining what employees in the bargaining unit here under consideration are performing duties the continued performance of which in case of a strike [is] necessary for the safety and security of the public. We are not entitled under that section to impose restrictions on the Employer as to how it should carry on the affairs of Government, except to this extent — that by rejecting a proposal by the Employer that certain persons be designated or by attaching conditions to a designation, we may affect the capacity of the Employer to make certain services available to the public if the employees concerned do go on strike.

In a great many cases the parties had agreed that the designated employees were to be required to perform their duties only in emergency situations.[222] In many cases some employees have been named as 'alternate designated employees', that is, either as replacements for designated employees who were absent or otherwise unavailable, or on a 'stand-by' basis; in the latter circumstance, they were required to report for work only if expressly called upon in specific situations.[223] A review of the Board's files reveals that as the parties gained experience, the catalogue of conditions under which designated employees were to perform their duties became more detailed, more elaborate and more sophisticated.[224]

Principles Established by the PSSRB in Designation Proceedings

Let us turn now to the situations in which the parties are unable to agree. By subsection 79(3) of the PSSRA, the responsibility for determining which employees or classes of employees are to be designated falls to the PSSRB after it has afforded each of the parties an opportunity to make representations.[225] In view of the concern expressed by the employer that the 'name list' of designated employees, in order to have optimum reliability, should be furnished when a conciliation board has been established,[226] the practice of the Board from the very outset was to determine, as a first step, the positions where the incumbents would be required to perform 'essential' duties in the event of a strike. In a sense, what the Board did was to identify functions or services which, in its view, had to continue to be performed in the interest of the safety or security of the public; the Board's practice has also been to determine the number and level of positions where the incumbents would be designated. The Board, in its decision, then directed the employer to file a 'name list' of designated employees. The list was to be set out in such a way as to identify the employees who occupied the positions concerned; it was to contain, in addition, the work station and last known address of each employee. The Board's decision included a direction that the list must be filed not later than the fifth day after a request was made for the appointment of a conciliation board.

In the *Veterinary Science Case*,[227] where the parties had been unable to agree on whether veterinarians in the Meat Inspection Branch of the Department of Agriculture should be designated, the Board, having come to the conclusion that some veterinarians in the Branch should be designated, said:

> In all the circumstances, by and large, we have elected to make our designations in terms of percentages of the establishment complement of veterinarians in the Meat Inspection Division in each province. For the convenience of the parties we have translated these percentages into the number of employees who are designated in each province. Our formula affords to the Employer the discretion to decide which employees are most appropriate for designation *for the safety or security of the public* in each province, both in terms of level and geographic location. In our view, the procedure which we have adopted is warranted in the light of the limited information at our disposal.

The decision of the Board was set aside by the Federal Court of Appeal[228] on the ground that lacking agreement between the parties, it is the responsibility of the Board alone to determine which employees or classes of employees in the bargaining unit were to be designated. The Board cannot delegate its responsibility to the employer, as it did "when it handed over to the employer, not only the discretion to decide which employees should be designated, but also their position level and geographic location within the province." The second reason given by the Court for its decision was that "in fixing a percentage of a class of employees within a province, without further refinement as to geographical location, the decision of the Board neither determines 'which of the employees' nor 'which classes of employees' are to be considered as 'designated'." The Board thereupon made another decision, designating certain employees in the Meat Inspection Branch by location, level and position number.[229]

Where the discontinuance of a service will hinder others who are engaged in essential services in the performance of their duties, the designation process becomes, in effect, a two-stage process. The first phase of this process involves determining which duties of the last-mentioned class are essential before it can be decided which employees should be designated in the first-mentioned class. The *Heating, Power and Stationary Plant Operations Designated Employees Case No. 1*[230] illustrates the problem that arises in such circumstances. Employees in the bargaining unit concerned operate and maintain "stationary plants for the generation of heat, electricity or steam, for refrigeration or air conditioning, for sewage treatment and disposal, for water supply and treatment, and for the pumping and storage of liquids in bulk."[231] By agreement of the parties, the PSSRB was asked to make, and did make, a preliminary determination:

> ...to identify those buildings in the National Capital Area . . . in which departmental functions are being carried out the continued performance of which is essential to the safety and security of the public and which functions cannot be carried out in those buildings at certain periods during the year in an adequate fashion unless services of employees in the heating, power and stationary plant operations bargaining units are available.

A similar task was undertaken by the PSSRB in a 1978 *Clerical and Regulatory et al. Case*.[232] In that case the Treasury Board and the Public Service Alliance of Canada, the bargaining agent for employees in the clerical and regulatory, programme-administration and data-processing bargaining units, agreed to request the Board "to hear and determine in principle whether, and if so, to what extent, the initiation and continuation of payments under certain social programs are necessary in the interest of safety or security of the public as contemplated by [the designation provisions] of the PSSRA." Included in the agreement were the following conditions:

> 1. that the parties will formulate and submit the question which is to be placed before the Board for determination in principle, i.e., the nature or type of social welfare payments which are required or are not required;
>
> . . .
>
> 3. that the parties agree to accept the determination made by the Board as the basis upon which they will endeavour to effect a settlement as to the persons or classes of persons that are to be designated for the safety or security of the public. . . .

In a 1979 *Radio Operations Case*[233] the parties had agreed on the employees to be designated, but disagreed on the nature of the duties some of the designated employees would be required to perform in the event of a strike. They then agreed to request the PSSRB "to confine the instant decision to making its determinations in respect of the duties in dispute." The parties stated that "upon receipt of the decision the parties will review their agreement on the employees to be designated and make the necessary changes in regard to the duties to be performed by each of them to conform with the Board's decision. A document encompassing the complete agreement of the parties will then be forwarded by the parties for incorporation in a final decision by the Board."

When a bargaining agent objects to the designation list furnished by the employer, but a collective agreement is entered into before the PSSRB has heard the parties or determined which employees are to be designated, it has been the Board's usual practice to terminate the designation proceeding without making a decision. The Board departed from this practice in the *Programme Administration Case*,[224] indicating that the practice deprived the parties of whatever guidance the Board might be able to give them about which employees might properly be designated. However, the Board cautioned that it might not adopt the same course in future cases; each case would have to be dealt with according to its own circumstances. In a later case, the *Clerical and Regulatory Case*,[225] the Board refused to hold a hearing on designations at the request of the employer; in this case an objection to designation had been filed by the bargaining agent, but the parties had entered into a collective agreement before the designation process was complete. The parties were advised that a hearing would be held only when a dispute regarding designations was material to the progress of bargaining.

What principles had the PSSRB developed for discharging its responsibilities in construing the key words in section 79 of the PSSRA: "duties . . . necessary in the interest of the safety or security of the public"? As the Board said in a 1979 *Radio Operations Case*,[226] it did not

> ...propose to attempt to provide a definitive answer as to the meaning to be attached to the words in question, if indeed a single meaning can be given which would fit all circumstances. The nature of the duties that are required to be performed in the interest of the safety or security of the public obviously will vary, depending on the services that are performed by the employees in the bargaining unit.

The PSSRB ruled out certain considerations as material in determining whether employees were to be designated. In the same *Radio Operations Case* it said:

> We have no hesitation in saying that duties, the performance of which are necessary in the interest of the safety or security of the public, do not encompass such duties as would serve only to permit the Employer to carry on business as usual; nor do they encompass such duties as would serve only to protect the Employer or the public from economic hardship; nor do they encompass such duties as would serve only to prevent inconvenience to the public.[227]

The Board also rejected the argument that designation deprives certain employees of the right to strike, and that this is a factor the Board ought to take into account in determining the number of employees to be designated in any particular case. The Board dealt with this argument in the *Electronics Designated Employees Case No. 1* as follows:[238]

> Counsel for the Bargaining Agent submitted that the Public Service Staff Relations Act granted full collective bargaining rights to Canadian public servants, including the right to strike, that the Board ought to do its utmost to preserve that right and that it should not permit the Employer to destroy it through the process of designation. . . . In our view, our responsibilities go much further. The statement that public servants have been granted full collective bargaining rights is true in the general sense but, like many generalizations, it is subject to qualifications and can be applied in specific cases only by reference to the qualifications as well as the general principle. The qualifications or limitations on the right to strike, set out in the Act are related to both time and function. We are concerned here only with the limitations that stem from function and more particularly those functions . . . that are related to safety and security. Persons who are engaged in the functions defined . . . are not permitted to strike at any time. . . . It is not that collective bargaining rights are denied to such persons. The subsidiary principle recognized by the Act is that one of the collective bargaining rights that may normally be exercised by employees cannot be exercised by specified persons if its exercise would jeopardize public safety and security as distinct from interfering with the capacity of the employer — as an employer — to carry on its day-to-day business. The role of the strike in North America is generally accepted to be purely economic. The traditional and normal raison d'être of a strike is to interfere with, or bring to a stop, the normal operations of the employer — as an employer — with a view to reducing the employer's bargaining power and increasing that of the employees. The strike has been tolerated, accepted and even encouraged by society itself as a means of balancing the bargaining power of the employer and the employees with a view to an eventual settlement. By-products of the strike are the inconvenience or hardship that may be suffered by the employer's customers. But the prime target is the employer, not the public. If the exercise of the right to strike does affect the safety and security of the public, rather than the profitability or convenience of the employer, the role of the strike is transformed by a change in kind and not merely a change of degree or effectiveness.

The general approach that the PSSRB adopted was indicated very early in the history of the legislation. In the *Electronics*

Designated Employees Case No. 1, the Board characterized the task it was called upon to perform in determining which employees are to be designated as an "awesome responsibility. . . . [I]n the final analysis, we are called upon to speculate as to what conditions may arise in the course of . . . a strike, should it take place, that may endanger the safety and security of the public. In these circumstances, the Board ought to err, if err it does, on the side of caution."[239] While the Board has held that "to encompass . . . within the words 'safety or security', the mental, psychological or emotional state of individuals strains the ordinary meaning of those words,"[240] nevertheless, where possible danger to life is concerned, it has gone to great lengths to ensure that public safety or security would not be endangered. As the Board said in the *Electronics Designated Employees Case No. 1*,[241]

> ...it appears to us that, in broad general terms, the approach we ought to take is that, if there is a piece of equipment available at any location that may in an emergency contribute to the safety of a person on a vessel or plane in distress at or near that location, it should be kept in functioning condition in the event of a strike. . . . We would not wish to have contributed to a state of affairs in which any person on a vessel or plane was subjected to a hazard that might have been avoided or lessened if a particular piece of equipment had been in operation.

At another point in its decision, the PSSRB stated: "where there are reasonable grounds for accepting the *probability*, or even perhaps only a *possibility*, that human life or public safety and security would suffer, [the designation provision of the PSSRA] comes into play."[242] This principle appears in the *Radio Operations Case*,[243] where the Board determined that services should be provided by radio operators, in the event of a strike, for the landing of aircraft, but not for the taking-off of aircraft, except for declared or apparent emergency evacuation operations or mercy flights.

In the *Electronics Designated Employees Case No. 1*,[244] the functions performed by electronic technicians in the Department of Transport were to[245]

> ...maintain electronic equipment on board Canadian coast guard ships and other government ships such as weather ships, icebreakers, search and rescue vessels and so on, as well as various types of electronic equipment, ranging from simple types to the most sophisticated, required for navigation and communication by sea and air. [Electronic technicians] also service equipment that

> enables Canada to fulfill its obligation with regard to air and marine safety communications under various international conventions, including its obligations to the International Civil Aeronautics Organization and the International Telecommunications Unit. This list merely gives examples. It is not intended to be exhaustive.

In arriving at its decision, the PSSRB was hampered by the paucity of evidence about the particular items of equipment that would be required to make it possible for the Department to render the services it judged necessary in the event of a strike. However, the Board came to the conclusion, on the basis of the evidence that it did have, that a great deal, but by no means all, of the equipment that the Department wished to maintain possessed the requisite essential characteristics. Nevertheless, it also found[246] that much of the equipment at each location formed "part of an integrated system in which the whole system must be maintained in operation to ensure that each part is functioning properly." Consequently it held, having regard to the nature of the evidence before it, that all employees proposed by the employer for designation who were engaged in servicing the equipment comprising the integrated system should be designated on a stand-by basis. The Board also held that technicians who service equipment for flight check and calibration for Decan and Loran "A" were performing duties necessary to the safety or security of the public.[247] This decision was based on the fact that the maintenance of the integrated systems was dependent on these facilities being kept in operation and took into account the traditional independence of mariners, some of whom are likely to brave the elements even if weather conditions are unfavourable. The same decision applied to technicians who service lighthouse-communications equipment necessary to the safety or security of the public.[248] In the *Air Traffic Control Case No. 4*,[249] the Board held that employees required to provide adequate supervision for other designated employees were themselves subject to designation.

No doubt, in view of the PSSRB's decision in the *Electronics Designated Employees Case No. 1*,[250] the respective parties agreed, in the course of later proceedings involving employees in the electronics bargaining unit and in kindred units, to define with considerable precision the equipment and the communications systems and services that were to be maintained in the event of a strike in order to safeguard air and marine navigation in case of emergency or hazardous conditions. The same approach was adopted towards employees in the air-traffic-control, radio-operations, communications, aircraft-operations and meteorology bargaining units.

In the *Electronics Designated Employees Case No. 2*, the PSSRB was called on to deal with a question concerning the essentiality of tape recorders used in connection with air-traffic-control communications channels. The tape recorders were important elements in the conduct of investigations to determine the cause of air crashes and the steps to be taken to avoid further mishaps of a similar nature. The Board held:[251]

> ...the phrase "the safety or security of the public" should not be restricted to the present or limited to emergency situations in the narrowest sense of that term. The scope of [the designation section] of the [PSSRA] is not confined to any period of time — [it] uses the words "at any particular time or after any specified period of time" — and concern for the safety and security of the public should apply equally to future situations as it does to those of the present, provided that the future situations are not of an abstract or highly speculative nature.

The Board went on to say that the investigation of incidents or accidents was intended to correct deficiencies in air safety and to improve generally the aviation standards in Canada, a matter of the highest interest in furthering the safety and security of the public; consequently the maintenance of the tape recorders in connection with air-traffic-control communication channels fell within the designation principle.

The concept of safety or security was given a broader context by the PSSRB in the *Ships Crews Case*.[252] Although the Board did not give reasons for its decision, except concerning one class of employees discussed below, inferences may be drawn from the types of employees who were designated. These included, in part, the crews of fire-boats at the dockyards on both coasts, of lighthouse-supply and buoy tenders operating during the summer navigation season, who would fall within the principles mentioned earlier, and crews of northern supply vessels sailing during the summer navigation season and of ice-breakers. Some ice-breakers were required to safeguard the lives of persons living on the banks of the St. Lawrence River, but other ice-breakers were also required to assist ships engaged in northern supply. Thus, supply of food and fuel and other necessities to isolated communities in the North was treated by the Board as a service necessary to the safety or security of the public. On the other hand, the protection of property was not so regarded, and the Board refused to designate oilers and firemen in the Department of National Defence, other than those engaged on the fire-boats, on the ground that their duties might be necessary in the interest of the safety and security of public property, but not in the interest of the safety and security of the public.[283]

Some instructive indications of the PSSRB's views in the application of the 'safety or security' prescription may also be derived from the Board's decision in the *Heating, Power and Stationary Plant Operations Designated Employees Case No. 1*.[284] As we pointed out earlier, in this case the parties asked the Board to make a preliminary determination to identify certain buildings in the National Capital Area, where the continued performance of the functions being carried out was essential to the safety or security of the public. Although the Board gave no reasons for its findings, it is possible, again, to draw some inferences from the decision about its views on the question posed in the request for the determination just mentioned. It should be borne in mind, however, that any inferences drawn may involve a degree of speculation since, in most cases, the decision merely identifies by name or number buildings or complexes heated by a central heating plant. As the Board pointed out, its decision was "not to be taken as implying that *all* employees working in any particular building are performing duties essential to the safety or security of the public or that all the employees performing work related to such departmental functions might be designated, should a question of designation arise in the future with regard to such employees."[285] Complexes to which heat was supplied that the Board identified as housing some employees performing essential functions included the Parliament Buildings (East, Centre and West Blocks),[286] the Supreme Court and the Department of Justice, the Department of National Defence (located, at the time, at Cartier Square, Ottawa), a building where employees were involved in radiation protection, and several buildings in which employees were engaged in testing food and drug products and carrying on research concerning communicable diseases. In addition, in an annex to the decision, the Board held in the same category the space required for the following departmental functions: Department of External Affairs (political area division: security, intelligence, defence strategies, disarmament, records of highly classified matters); Department of External Affairs (consular division: protection of Canadians abroad, evacuation, medical assistance and identification in case of accident, repatriation, clearing-house information); Department of External Affairs (passport office); Department of Consumer and Corporate Affairs (the analysis and testing of hazardous products); Department of National Defence (laboratories and testing facilities and the Directorates of Communications and of Nuclear and Arms Control Policy). On the other hand, the Board held that employees in the bargaining unit here under discussion who were working in a great many other buildings in the National Capital Area were not subject to designation. Most of these buildings are identified by name only and, with a few exceptions, it is difficult to draw any inference about the functions carried out in them. The exceptions include the following: Ottawa Postal Terminal (Alta Vista), National Revenue Taxation, Statistics Canada, Public Service Language School, Executive Training Centre, Mineral Process Directorate Geological Surveys, supply centres, National Library and Public Archives, National War Museum and Victoria Museum.[257]

The PSSRB also 'recognized' the 'essentiality' of Parliament and the courts in the *Translation Case*[258] where the Board designated translators assigned to Parliament while it was in session, as well as translators engaged in the translation of public bills and translators assigned to the legal sections of the Department of Justice. Translators were also designated for the Office of Director General, Intelligence Services of the Privy Council and for the Departments of External Affairs and National Defence.

In a 1976 *Programme Administration Case*,[259] the PSSRB was called on to consider the bargaining agent's objection to the employer's proposal for the designation of almost 3000 of the employees in the programme-administration bargaining unit employed in Revenue Canada, Customs and Excise. The employees concerned fell into two groups: officers in commercial operations (non-uniformed officers) and uniformed officers. The commercial operations aspect of the case is another example of the two-stage process of designation. At the hearing before the Board, the employer's position was that non-uniformed officers who appraise, examine and release goods in Canada were required to deal with the entry into Canada of certain types of goods described in broad terms,[260] which the employer considered essential to the safety or security of the public. The representative of the bargaining agent conceded that the servicing of some ports of entry for essential goods was necessary. He was also in agreement that some, but not all, types of goods listed in the employer's submission were essential, but contended that these types should be precisely defined to establish their essentiality. Considering the evidence presented and the position taken by the bargaining agent, the Board determined that the *importation* of the following types of goods was necessary for the safety or security of the public: foodstuffs, medical and pharmaceutical products; medical apparatus; equipment and supplies required for national defence or in the event of a national, regional or local disaster; material required by police, fire and civil defence organizations; fuel for heating and fuel to be used in the production of energy.[281] In all these instances, the necessity for importing the goods was to be certified by specified authorized agencies. In addition the importation of such goods was subject to the condition that they not be available in Canada, and that there be no suitable substitutes for them in Canada. One type of goods that the employer included in its list was "Safety and security related products including raw materials, parts, or components for their manufacture." About this class, the Board said:

> ...as we understand the situation, the goods would be imported for use by a manufacturer who operates under the general labour relations legislation. A strike of employees of a manufacturer engaged in the production of safety and security related products would halt the manufacture of those products. No legislation has been brought to our attention providing for the designation of employees of the manufacturers of such products. If the end products of the process of manufacture are things that are essential to the safety or the security of the public and are not otherwise available in Canada, similar products could be imported and their importation would be accommodated by our finding that employees ought to be designated to permit the entry of those products.

As far as uniformed officers are concerned, the evidence was that they are located at all ports of entry into Canada, and they process travellers entering Canada as well as any goods that the travellers may bring with them. They are the 'first line of defence' against the admission of undesirable aliens: for example, criminal elements and persons non-admissible under the immigration laws. They are also on the look-out for prohibited goods, and one of their duties is to prevent smuggling. The representative of the bargaining agent conceded at the hearing that since a uniformed officer had to screen each individual traveller, service must be maintained at ports of entry to prevent the entry of undesirables and to permit travellers entitled to enter to bring in their personal belongings. However, he contended that a limited service should be provided. The PSSRB determined that at airports and seaports, where large numbers of travellers arrive at the same time and thus must be processed quickly to avoid the risk that they may become disorderly and/or that controls might be so relaxed that undesirable persons or prohibited goods might gain entry, a sufficient number of officers should be designated to process all incoming travellers on arrival with a minimum of delay. The Board further held that limited service should be provided at entry ports along the Canada–U.S. border.

The *Veterinary Science Case*[202] posed a problem of a somewhat different order. The bargaining agent had objected to the employer's proposal to designate veterinarians in the Meat Inspection Branch of the Department of Agriculture. The Canada Meat Inspection Act requires federal inspection of all red meat and poultry for international and interprovincial consumption. It also makes provision for the inspection of such produce packed in registered plants, even though some of the produce is destined for consumption within the province where a plant is located, as well as in any other province or abroad. Some provinces have meat-inspection facilities of their own. Veterinarians of the Meat Inspection Branch conduct ante-mortem and post-mortem inspections of livestock and poultry, sanitary supervision and certification of meat products. The position of the employer was that in the event of a strike involving veterinarians in the Meat Inspection Branch, there was possible, or even probable, danger of the public's being exposed to contaminated meat, a sufficient hazard to public safety to warrant the veterinarians' designation. The PSSRB held that the duties of veterinarians in the Meat Inspection Branch were necessary to the safety or security of the public. However, it limited the number of veterinarians to be designated, taking into account the functions that could be performed by primary products inspectors, who were included in another unit, as well as the facilities available in provincial jurisdictions.

The *Clerical and Regulatory, Programme Administration and Data Processing Case*[203] brought into focus the 'essentiality' of support services for certain welfare programs, which include Public Service Superannuation, RCMP Superannuation, Canadian Forces Superannuation, MP's Retiring Allowance, Old Age Security/Guaranteed Income Supplement, Canada Pension

Plan, Canadian Pension Commission, War Veterans Allowance/Civilian War Allowance, Returned Soldiers and Veterans Insurance, Unemployment Insurance, Canadian Government Annuities, Canada Manpower Employment Training Programs and Family Allowance. The Board had been requested by both parties to "make a determination, in principle, as to the payments that are required or are not required to be continued in the social welfare field for the safety or security of the public in the event of a strike," and to deal with each program separately. The general principle that the Board laid down in its decision was as follows:

> 1. The safety or security of the public is not necessarily affected by a failure to initiate and continue the payments under the criteria of each of the . . . social welfare programs . . . enumerated. . . .
> 2. Many of those programs consist of a wide income spectrum of recipients ranging from economic independency to dependency on these programs. Within the spectrum of each program, there may be a segment of recipients who have such a degree of income dependency that there may be a risk of a hazard to their health if such recipients were deprived of the opportunity to receive the payments to which they are entitled and on which they rely as the only reasonable and reliable source to meet their minimum needs for sustenance.
> 3. In the opinion of the Board only the payments provided to the segment of recipients described above can be deemed to fall within the contemplation of . . . the Public Service Staff Relations Act as being necessary for safety or security of the recipients. However, it is impractical to formulate a guideline to ensure that only needy recipients as above described would have the opportunity to continue to receive their payments. The determination of this issue requires a pragmatic approach in our view. It is therefore inevitable that certain recipients who are not dependent on payments under these programs may continue to receive them. The Board considers that it is preferable to err on the side of caution than to knowingly deprive anyone of the opportunity to meet [his] minimum economic requirements. In those rare cases where dependent recipients may unintentionally fail to receive a payment, the alternative resources available in every community can be reasonably relied upon to ensure that the safety or security of such persons will not be adversely affected.

The PSSRB then proceeded to determine what it regarded as the level of income below which the safety or security of the public may be affected.[264] It provided that under those programs where the total income of the recipient fell below that level, all payments to recipients should continue. This provision affected, for example, persons receiving a Guaranteed Income Supplement. Under other programs, however, the recipient should continue to receive payment only if he or she filed a declaration with the responsible department disclosing that his or her total income fell below the effective level.[265] The proceeding was ultimately terminated for each of the bargaining units involved when the parties succeeded in entering into new collective agreements without resolving the question of which employees were to be designated under the formulae set out in the Board's decision.[266]

The issue of whether support services for social welfare programs fell within the essentiality principle of section 79 of the PSSRA was again canvassed in the *Data Processing Case*.[267] Counsel for the bargaining agent argued that "in the context of the Act, the phrase 'in the interest of the safety or security of the public' in section 79 must be interpreted as meaning only circumstances of imminent physical danger or possible infringement of national security."[268] The Board rejected the argument that the discontinuance of some social welfare programs could not be regarded as affecting the safety or security of the public.[269] It also expressed its agreement with the conclusion "in the earlier decision that, in the event of a strike, entitlement to payment under most of the programs should be income tested, so that only those recipients who are dependent on payments under each program would continue to receive them." The Board concluded, nevertheless, that "the solution proposed by the Board, in principle, in the earlier decision and the suggested method of its implementation create sufficient doubt as to whether the intended result would be achieved".[270] It therefore devised a different formula. It analysed fifteen programs, and after considering, among other circumstances, the number of dependent recipients and the acuteness of their need, it determined which programs were to be continued.[271] It recognized that, "By adopting this approach . . . recipients not dependent on a program will continue to receive payment also. This is the price or trade-off that must be accepted to achieve our primary goal."

As we have seen, where the parties reached agreement about the employees to be designated, they had not infrequently specified in their agreement the conditions under which the duties of designated employees were to be performed. On a number of occasions when the parties failed to agree on all or some of the employees to be designated, and the matter came before the PSSRB for determination, counsel for the employer contended that section 79 of the PSSRA does not confer on the Board authority to limit the duties or functions that could be assigned to a designated employee. In the *Heating, Power and Stationary Plant Operations Case*,[272] the parties, in a "Statement of agreed Facts and Issues", put the following question to the Board: "Is the employer free to assign to a designated employee any of the duties or responsibilities of another employee in the bargaining unit whose position is not designated under section 79?" The Board replied:

> It must be made clear that the Act limits the discretion of the Employer in assigning duties during a strike and that some employees are designated following agreement by the parties or determined by the Board as to who will be called upon to continue to work for the purpose of performing work that is required for safety and security of the public. Once the employee is designated he must perform the work for which he has been designated and the Employer is not free after the employee has been designated to use him as he sees fit, nor is he free to decide unilaterally what is required for safety and security. He must endeavour to reach agreement with the bargaining agent and, failing this, he must come to the Board for determination.

Counsel for the employer challenged the Board's authority to limit the power of the employer to assign duties to a designated employee in the *Data Processing Case*,[273] but his argument was rejected by the Board which, while admitting that the employer's position was not without plausibility, nevertheless held as follows:

> The purpose of section 79 . . . is to protect the public but only to the extent of ensuring that those duties required for safety or security are maintained in the event of a strike by employees in the particular bargaining unit. . . . [T]he non-performance of ordinary duties is fully within the contemplation of the Act as this Board is exclusively concerned with those duties which are essential to the safety or security of the public. In our opinion, the purpose of section 79 when read together with paragraph 101(1)(c) is to limit the scope of a legal strike only to the extent of ensuring the performance of those duties that are necessary in the interest of the safety or security of the public.
>
> ...an employee who is designated pursuant to section 79 of the Act may be required, in the event of a strike, to perform only those duties for which he has been designated. To the extent that the parties are unable to agree on the duties or functions that must be

performed in the interest of safety or security, the Board would make a determination.

The Board went on to express the opinion that the approach it adopted would be likely to induce the parties to reach agreement more readily, since there would be an incentive for the employer so to organize its operations during a strike that a minimum number of employees would be designated and would be as fully occupied as possible in the performance of necessary duties.

The Courts' Decisions in the Canadian Air Traffic Control Association Case

The proceedings in the *Air Traffic Control Case* in 1980[274] cast a cloud on the course that had been followed by the parties in dealing with designations and the principles that the PSSRB had established in applying section 79 of the PSSRA over the years since the Act came into force. In the first designation case that came before the Board — an air-traffic-control case in 1968 — the employer had limited its proposals for designation to air-traffic controllers engaged in 'emergency or hazardous situations.'[275] In addition the employer undertook *in its proposals* to suspend all traffic-control services relied on chiefly by commercial air lines.[276] Until 1980 a similar undertaking was given by the employer in every succeeding round of bargaining for employees in the air-traffic-control unit. As we saw earlier, the Board, in the *Electronics Designated Employees Case No. 1*,[277] held that it could not impose conditions on the employer to control how the government should carry on its affairs, except that, by rejecting a proposal by the employer for designation or by attaching conditions to a designation, it might affect the ability of the employer to make certain services available in the event of a strike.

In 1980 the Minister of Transport decided[278] that "all government aerodromes and air stations were to remain operational at all reasonable times", that is, even in the event of a strike by employees in the air-traffic-control unit. In view of this decision, the employer proposed that in the event of a strike by employees in that unit, all operational traffic controllers be required to perform their regular duties. When the bargaining agent objected to the employer's proposals, the Board held unanimously, in a preliminary decision, that it was not bound

> ...to take into account ministerial or governmental pronouncements as to the level of service to be maintained. . . . Implicit in making its determinations as to the number or classes of air traffic controllers needed for "designation" in the instant case is the requirement that it make a decision as to the level of services by air traffic controllers that is necessary to be maintained at federal government regulated airports in order to ensure the safety or security of the public in the event of a lawful strike by members of the unit.

Subsequently, after a hearing on the merits, a majority of the Board determined that it should be guided, in the main, by past agreements between the parties on the matter of designation.

On an application by the employer to the Federal Court of Appeal, the PSSRB's decision was set aside, and the matter was referred back to the Board.[279] In the course of his decision, Pratte J. said:

> [Section 79] clearly does not authorize the Board to regulate the effect of the designation by prescribing the duties that designated employees will have to perform in the event of a strike. . . .
>
> It is also clear, in my view, that s. 79 merely empowers the Board to designate employees or classes of employees on the basis of their duties as they exist at the time the designation is made. . . . All employees "whose duties consist in whole or in part of duties the performance of which . . . is or will be necessary in the interest of the safety or security of the public" must be designated by the Board even if the presence at work of all those employees may not be necessary for the satisfactory performance of those duties. It follows that the Board may not discriminate between employees having similar duties by designating only a few of them. It also follows that the Board may not make a designation on the basis of the duties that, in its view, an employee should be required to perform in the event of a strike. It also follows that the Board does not have the power, under s. 79, to determine, as it has done in this case, the number of employees that should be required to stay at work, in the event of a strike, so as to provide the public with the minimum level of services required in the interest of public safety.

Urie J., in a concurring decision, said:

> Neither the wording of the subsection taken by itself or in the context of the Act as a whole contemplates that such a determination is to be made on the basis of the safety and security necessities of the public only in a strike situation. It follows that the subsection does not authorize the Board to designate duties to be performed or the extent of services to be rendered in the event of a strike.

In light of the decision of the Federal Court of Appeal, the PSSRB held subsequently that "all operational air traffic controllers, as a class of employees, have duties the performance of which at any particular time or after any specified period of time is or will be necessary in the interest of the safety or security of the public." Accordingly it designated all operational air-traffic controllers.

Subsequently the Supreme Court of Canada, in a unanimous decision, upheld the decision of the Federal Court of Appeal.[280] Martland J., speaking for the Court, stated that he agreed with the reasons for decision given by the Federal Court of Appeal. He disagreed with the PSSRB's construction of section 79 of the PSSRA and said:

> As I see it, the task of the Board when called upon to make a determination under subsection 79(3), is to consider those employees and classes of employees in the bargaining unit who have been designated by the employer, and to decide whether the performance of their stipulated duties as employees is necessary for public safety or security.
>
> The whole procedure provided for in section 79 occurs prior to the establishment of a conciliation board. I can find nothing in the section to indicate that the function of the Board is to determine, if conciliation should fail, what services normally provided by employees in the bargaining unit are, in the event of strike action, necessary to be continued in the interest of public security or safety, and the section contains no reference to any power in the Board to designate the duties of employees necessary in the interest of the safety or security of the public during a strike.

Martland J. added that he agreed with Urie J. that the PSSRA does not authorize the Board to determine the level of services to be provided. He conceded that "the result of the Court's decision is certainly to impair the impact of a strike by employees in the bargaining unit involved", but expressed the view that "that does not mean that the decision is wrong."

The effect of this decision of the Federal Court of Appeal and that of the Supreme Court is that there is a 'whole new ball game' for designation under the PSSRA. Past agreements of the parties and past decisions of the Board can no longer be relied on for guidance. The Courts' decisions will have an impact on designations in many other units besides the air-traffic-control unit; it will affect, for example, electronics, radio-operations, fire-fighters, meteorology, clerical and regulatory, and data-processing units, among others.[281] The ability of employees in these units to conduct an effective lawful strike will be severely hampered. When the legislation was being considered by the Special Committee in 1966, Dr. George F. Davidson, then Secretary of the Treasury Board, stated that the arrangement proposed in Bill C-170 in relation to designation "is very much like the standby arrangements that the unions accept as being part of their responsibility in the industrial setting. In essence, this is a much more limited provision than the provision which I understand exists in the industrial setting."[282] It would thus appear that the wording of section 79 does not reflect accurately what the authors of the legislation had in mind when the section was originally drafted. Indeed, the wording does not 'reflect' accurately the construction of the section that, for all practical purposes, the federal government had adopted in its proposals before 1980.

Onus of Proof in Designation Cases

Where does the onus lie to establish that the duties of a particular employee are necessary in the interest of the safety or security of the public? In the *Radio Operations Case*,[283] counsel for the employer submitted that "the mere assertion by the Employer that the designation of certain employees to perform specified duties [is] necessary in the interest of the safety or security of the public establishes a *prima facie* case for their designation." On the other hand, counsel for the bargaining agent submitted "that the full onus rests on the Employer to demonstrate that the employees it proposes for designation and the services they perform are necessary for the safety or security, as opposed to the convenience of the public." The Board refused to accept either position and said:

> While, in our view, the primary onus rests with the Employer, there is an obligation on both parties to provide convincing evidence and arguments in support of their respective positions. In this regard we would stress the fact that, in making its determinations, the Board is dependent on the evidence adduced by the parties. It should be remembered as well that the determinations made by the Board in "designation" proceedings are designed to ensure the safety or security of the public rather than to advance the partisan interests of either party in the event of strike action.[284]

The Board went on to comment as follows:

> Furthermore, notwithstanding the "designation" determinations made by the Board, there is, in our view, also an obligation on all of

> the parties of interest to take such other measures, within their competence or authority, as may be required to ensure the safety or security of the public in the event of and during the course of a strike. In the case of the Employer, this may mean providing alternative services or authorizing limitations on or the cessation of certain operations. . . . In the case of the Bargaining Agent and the employees in the unit concerned, this may mean the authorizing and/or the providing of certain services to meet unanticipated situations that are clearly hazardous but which are not covered by the Board's designations until such time as the Board can take appropriate corrective action. We believe that there must be an acceptance by the parties of such an obligation, particularly having regard to the dependence of the Board on the parties in the initial making of its determinations and the element of conjecture that is involved.

In the *Canadian Air Traffic Control Case*, counsel for the employer submitted in argument that the Board had erred in holding that the burden of proof rested equally on both the employer and the bargaining agent. The Federal Court of Appeal indicated at the hearing that it did not find it necessary to express any opinion on this contention.

In the *Radio Operations Case* discussed above, the bargaining agent requested the PSSRB to instruct the employer to make available to the Board and to the bargaining agent information about all contingency plans related to the duties of radio operators and the effect of the withdrawal of their services. The Board denied the request, but urged the employer to provide "such information as was in its possession as to what, if any, alternative services would or might be available to the Employer should the designated employees in a strike situation not perform the duties in dispute." A document containing this information was subsequently provided by the employer. Whether the Board's past rulings on onus still apply, or how they may have to be modified in light of the decisions of the courts in the *Canadian Air Traffic Control Association Case* is one of the problems with which the Board will have to struggle in the days after the PSCRA ceases to have effect.

Since it is impossible to foresee all eventualities if a strike should occur, it has been the practice of the PSSRB to include in its decisions on designation the following statement:

> We recommend to the parties that, forthwith upon receipt of this decision, they meet to discuss the possibility of establishing a joint committee to deal in an expeditious fashion with any problems that may arise with regard to the services of the designated employees

> concerned in the event of a strike. Should the employees in this bargaining unit engage in a strike and should problems arise that could not have been foreseen before the commencement of the strike, the Board will be available to deal with them on a high priority basis.[285]

Notice to Designated Employees

A final decision of the Board determines which classes of employees are to be designated. The decision invariably contains a statement drawing attention to the Board's responsibility under subsection 79(5) of the PSSRA to inform each of the designated employees of the fact that he has been designated; this must be done in order to ensure that each designated employee is made aware that he is not entitled to strike. The Board then goes on to direct the employer to file a 'name list' of designated employees not later than the fifth day after the process for the establishment of a conciliation board is initiated.

When a list of designated employees is filed by the employer at the PSSRB's direction, the bargaining agent is given a brief opportunity to check the list and bring to the attention of the Board any errors or objections it may have. Objections are generally few and usually relate to employees whom the bargaining agent has charged with responsibility for managing the strike on behalf of the bargaining agent.[286] Notices are then served on designated employees by the Registrar of the PSSRB, advising them that they have been designated and informing them of any conditions that may be attached to the performance of their duties, of the fact that designated employees are forbidden to strike, and of what the penalties are for infringement of the prohibition.

Section 112 of the PSSRA

In any discussion concerning the provisions of the PSSRA that relate to the safety or security of the public, one ought not to overlook the saving provision in section 112 of the Act. This section exempts from all other provisions of the legislation "any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada."[287]

The Impact on the Designation Process of the PSCRA

In the *Electronics Case*[288] heard in February 1983, the Chairman of the PSSRB held that in view of his earlier decision in the *Programme Administration Case*[289] concerning the resolution of any bargaining dispute "through the vehicle of a conciliation board", there could be no resort to the designation process while the PSCRA was in effect.

Notes

1. *Report of the Preparatory Committee on Collective Bargaining in the Public Service* (Ottawa: Queen's Printer, 1965), pp. 36–37. (Hereafter referred to as *Report of the Preparatory Committee*.)
2. There had also been strikes of employees of the Post Office in 1918 and in 1924. See Chapter 1, note 51, above.
3. *Proceedings of the Special Joint Committee of the Senate and of the House of Commons on Employer-Employee Relations in the Public Service of Canada* (Ottawa: Queen's Printer, 1966), pp. 204–5. (Hereafter referred to as *Proceedings*, 1966.)
4. In the *Welfare Programmes Case* (1980) PSSRB file 148–2–53, the Public Service Staff Relations Board held, on an application under s. 18 of the PSSRA, that it had no authority to waive the time limits set in the Act for specifying an alteration in the process (that is, before notice to bargain was given), where the applicant claimed that the delay was caused by an oversight.
5. S. 45.
6. See above, Chapter 6, pp. 277–78. J. Finkelman, *Employer-Employee Relations in the Public Service of Canada: Proposals for Legislative Change* (Ottawa: Information Canada, 1974), Part I, pp. 136–37 (hereafter referred to as the *Finkelman Report*), recommended that the alteration of the dispute-resolution process should be made not less than six months, but not more than eight months, before the expiry of an applicable agreement or award.
7. In the *Computer Systems Administration Case* (1970) PSSR Reports K 654, the PSSRB was called upon to deal with a request by a bargaining agent under subsec. 36(2) of PSSRA. The request had been made some eight months before the expiry date of a collective agreement. The employer objected that the request was premature and contended that the statement should be furnished at the earliest date that a change in specification of the dispute-resolution process could be filed by the bargaining agent. The Board directed that the employer should furnish the

statement a month and a half before the time fixed for the filing of an alteration of specification by s. 35 (then numbered s. 34A) of the Board's *Regulations and Rules of Procedure*. In the view of the Board, this interval would give the bargaining agent "sufficient time to consult its members and consider the matter thoroughly" (at K 656).

8. See pp. 507–10, below.

9. See p. 485, below.

10. See p. 485, below.

11. *Finkelman Report*, Part I, p. 137.

12. S. 44.

13. As we shall see in the volume to follow this study, which will deal with the provincial experience, this approach to the problem stands in sharp contrast to the situation under the New Brunswick Public Service Labour Relations Act, which also provides for a choice between the two dispute-resolution processes. Under the New Brunswick legislation, reference to arbitration is available only on consent of both parties. R.S.N.B. 1973, c. P-25, ss. 66 and 72 ff.

14. The four units last referred to were postal operations (25 000 employees), ship repair (2300 employees), printing operations (1200 employees), and air-traffic control (1000 employees).

15. See Table 8 for present specification for each unit and changes in specification over the years.

16. L.W.C.S. Barnes and L.A. Kelly, *Interest Arbitration in the Federal Public Service of Canada* (Kingston: Industrial Relations Centre, Queen's University, 1975), p. 12. (Hereafter referred to as *Interest Arbitration*.)

17. See Chapter 4, above, and p. 453 ff., below.

18. PSAC, which initially specified arbitration as the dispute-resolution process for most of the units for which it was certified as bargaining agent, is affiliated with the Canadian Labour Congress. However, its traditions are rooted in the civil service, and most of its members were not "too interested in the strike", as Claude Edwards, president of the Civil Service Federation and later president of the Alliance, pointed out in a television interview (reported in *CSAC Journal*, February 1965). (See Barnes and Kelly, *Interest Arbitration*, p. 4.)

19. Barnes and Kelly, *Interest Arbitration*, p. 35, also take note of this militancy. They say:

> The change of attitude may well have been hastened in recent years by the skewed age distribution of employees in the service. The large post World War II intake of men and women

who, by and large, fought for and sustained the concept of "negotiation and arbitration" has now passed into the retiring age zone. More and more they are being replaced, both in positions of leadership as well as in the ranks of the unions, by younger people whose objectives and methods are influenced more by the realities of the present scene than by the memory of past objectives. Like the Egyptians of old, they "knew not Joseph". There seemed little reason for them to stand aside from the nation-wide tide of militancy which appeared to be carrying their fellow unionists forward from success to success.

20. See Chapter 4, above.

    It has also been suggested by a few representatives of bargaining agents that the conciliation-board option gives the bargaining agents a voice in the selection of the chairman of that board, whereas bargaining agents have no choice in the selection of the members of the PSSRB who are assigned to a reference to arbitration. See, in this connection, Chapter 13, note 18, below.

21. See pp. 507–10, below.

22. These matters are set out in the terms of reference delivered to the conciliation board by the Chairman of the PSSRB.

23. The process of dispute resolution specified for the correctional units was altered in 1976 from arbitration to reference to a conciliation board. It was again altered in 1979 and, for a second time, reverted to reference to a conciliation board in 1981. The vast majority of the employees in these units are designated employees (see p. 483 ff., below), who cannot engage in a lawful strike. Possibly, one of the reasons for specifying reference to a conciliation board was to draw attention to certain aspects relating to the personal security of guards employed in penitentiaries, especially in the light of Canada's abolition of the death penalty.

    For a discussion of reasons for the alteration of the dispute-resolution process, see Jacob Finkelman, "Presidential Address" in *New Dimensions in Dispute Resolution*, 1976 Proceedings, Fourth Annual Meeting, Society of Professionals in Dispute Resolution (Washington, D.C.: Society of Professionals in Dispute Resolution, 1978), pp. 196–98. (Hereafter referred to as "Presidential Address".)

24. Under the New Brunswick Public Service Labour Relations Act, the decision on the process of dispute resolution is made at the point of impasse. See note 13, above.

25. See Chapter 4, above.

26. Part I, pp. 125–30.

27. The designation process is discussed below, p. 483 ff.

28. See Finkelman, "Presidential Address", pp. 192–93.

29. The *Finkelman Report* (paragraph 237) also recommended that the legislation, notwithstanding its other provisions, permit the parties, by mutual consent, to resort to final-offer selection in whatever form they think best-suited to their needs in any particular case. Final-offer selection is one of the dispute-resolution processes provided for under the Ontario School Boards and Teachers Collective Negotiations Act, R.S.O. 1980, c. 464, ss. 37 ff.

30. See p. 428, above.

31. William E. Simkin, *Mediation and the Dynamics of Collective Bargaining* (Washington, D.C.: The Bureau of National Affairs, 1971), p. 27 (hereafter referred to as *Mediation*), notes that "when the Taft-Hartley Act was being written in 1947, the House version described the new independent agency as the Federal Conciliation Service; the Senate version called it the Federal Mediation Service. In conference, the redrafters set an example for all good compromisers and the result was the Federal Mediation and Conciliation Service."

    In some jurisdictions the applicable statute may provide for the appointment of a person selected jointly by the bargaining parties and described as a 'mediator', in the place and stead of a conciliation officer.

32. Simkin, *Mediation*, p. 111.

33. The reference here is to mediation before a conciliation board is appointed or a dispute has been referred to arbitration or, where the dispute has been so referred, before an award is made.

34. The Quebec Labour Code, R.S.Q. 1977, c. C−27, s. 44, as amended by S.Q. 1977, c. 41, s. 56, declares that "The parties are bound to attend any meeting to which the conciliation officer calls them."

35. The rationale for such a policy was that the request by one party for the appointment of a conciliator, under s. 52 of the PSSRA, could be regarded as a tactic of the requesting party to delay the establishment of a conciliation board. See pp. 436 and 467, below.

36. An interesting question arose in connection with the appointment of Judge Lippé in the 1968 postal dispute. Subsec. 17(4) of the PSSRA states that "The Chairman may appoint and, subject to the approval of the Governor in Council, fix the remuneration of, conciliators and other experts or persons having technical or special knowledge to assist the Board in an advisory capacity." Doubt was expressed by an official of the Treasury Board that Judge Lippé could be regarded as a conciliator or expert to assist the PSSRB. The matter was resolved amicably, and subsequently an order in council was issued fixing the remuneration of mediators. However, the order spoke of mediators appointed under s. 17 of the PSSRA. (See P.C. 1970−121, 21 January 1970.)

37. Arbitral Awards file 185–1–56.

38. PSSRB, *Eighth Annual Report, 1974–1975*, pp. 26–27. The staff of the OMS also investigate complaints of unfair practices and inquire into, and report to the Board on, the duties and responsibilities of persons proposed for designation as employees who function in a managerial or confidential capacity. In the course of these inquiries, they perform a mediation function. OMS staff also investigate disputes, or potential disputes, arising from the designation of employees performing duties essential to the safety or security of the public. (See below, p. 483 ff.)

    The OMS has recently begun to examine what role it can play in the mediation of grievances.

39. The *Annual Reports* of the PSSRB indicate that the vast majority of disputes are now increasingly dealt with by the staff of the OMS. *Ad hoc* mediators or conciliators are now rarely appointed.

40. The text refers to a conciliator appointed under s. 52 of the PSSRA. The functions of a mediator are, of course, the same as those of a conciliator appointed under that section.

41. See also note 35, above.

42. See Table 21.

43. In some years (that is, 1970, 1974 and 1980), the percentage exceeded 40 per cent, and in 1980 it came close to reaching that figure.

44. Simkin, *Mediation*, p. 342.

45. See, for example, Otto Kahn-Freund, "Legal Framework" in Allan Flanders and H.S. Clegg, ed., *The System of Industrial Relations in Great Britain* (Oxford: Basil Blackwell, 1954), pp. 101–2; David L. Cole, "The Search for Industrial Peace" in "Exploring Alternatives to the Strike", in a Special Section, 96 *Monthly Labor Review* (1973), pp. 37–39; Donald J.M. Brown, *Interest Arbitration*, Task Force on Labour Relations, Study No. 18 (Ottawa: Queen's Printer, 1969), p. 270 (hereafter referred to as *Interest Arbitration*); *Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (Ottawa: Queen's Printer, 1969), p. 129; J. Joseph Loewenberg *et al.*, *Compulsory Arbitration: An International Comparison* (Lexington, Mass.: D.C. Heath, 1976), pp. xxxi, 196 (hereafter referred to as *Compulsory Arbitration*); Arvid Anderson, "Lessons from Interest Arbitration in the Public Sector: The Experience of Four Jurisdictions" in *Arbitration — 1974: Proceedings of the Twenty-Seventh Annual Meeting, National Academy of Arbitrators* (Washington, D.C.: The Bureau of National Affairs, 1975), pp. 59, 62; David B. Archer, "An Overview of Collective Bargaining in the Public Sector" in *Industrial Relations in Canada: Towards a Better Understanding* (Ottawa: The Conference Board in Canada, 1978), p. 65; Robert Howlett, "Contract

Negotiations Arbitration in the Public Sector", 42 *Cincinnati Law Review* (1973), p. 53; Joseph M. Weiler. ed., *Interest Arbitration: Measuring Justice in Employment* (Toronto: Carswell, 1981).

46. P. 426, above.

47. *Report of the Preparatory Committee*, pp. 35–36.

48. For an account of the provisions of the PSSRA that governed the eligibility of members of the Tribunal, the procedure followed in the appointment of members, and the assignment of members to a particular reference, see Chapter 13, below.

49. For the rationale for this recommendation, see the *Finkelman Report*, Part 1, pp. 255–57 and Chapter 13, note 13 and p. 665, below.

50. S.C. 1974–75–76, c. 67.

51. For a discussion of the nature of the obligation to bargain in good faith, see Chapter 6, pp. 279–82, above, and for a discussion of the nature of the remedies available for a failure to bargain in good faith, see Chapter 12, p. 649, below.

52. In such an event, as we have seen (p. 433, above), either party may request that a conciliator be appointed to assist the parties in reaching agreement.

53. (1980) Arbitral Awards file 185–2–227.

54. The *Finkelman Report*, Part I, pp. 155–56, noted that the statutory time limits made it impossible to repair an oversight and recommended that a party should be entitled to amend its specification of matters referred but, to prevent abuse, only on consent of the PSSRB.

55. (1969) Arbitral Awards file 185–2–5.

56. See below, p. 460. The *Finkelman Report*, Part I, pp. 156–57, recommended that where there has been such a tentative agreement on some matters, and yet the parties have been unable to resolve their differences after the arbitral award is issued, either party should be entitled to make a further reference to arbitration on such matters, but only within a limited period after the issue of the award.

57. (1971) Arbitral Awards files 185–2–15 and 185–2–16.

58. For a detailed discussion of matters that are arbitrable, see Chapter 4, above.

59. PSSRA, s. 70(3).

60. (1971) Arbitral Awards file 185–2–28. Compare *Engineering and Land Survey Case*, p. 439, above. However, in the *Mathematics Case* (1979) Arbitral Awards file 185–2–211, a proposal was rejected when it was admitted that it was first introduced by a party several weeks after a request for arbitration had been made.

61. Lon L. Fuller, "Collective Bargaining and the Arbitrator", 3 *Wisconsin Law Review* (1963), p. 28.

62. *Report of the Preparatory Committee*, p. 36.

63. (1973) PSSRB files 168−2−43, 168−2−45, 168−2−46, 148−2−9 and 148−2−10.

    Walter J. Gershenfeld, an arbitrator with considerable experience in the field of interest arbitration in the United States, said: "Every student of industrial relations knows that criteria are both real and rationalizing standards and that they remain useful despite our ability to find serious limitations in them." "Decision-Making in Interest Arbitration: Perceptions of the Arbitrator and the Parties" in *Truth, Lie Detectors, and Other Problems in Labor Arbitration: Proceedings of the Thirty-First Annual Meeting, National Academy of Arbitrators* (Washington, D.C.: The Bureau of National Affairs, 1978), pp. 306−7.

64. In the *Secretarial, Stenographic and Typing Case* (1980) Arbitral Awards file 185−2−219, the PSSRB, in dealing with a proposal by the bargaining agent for the reduction of hours of work, expressed the opinion that "section 68(c) contemplates that the Board will not award a condition of employment for one occupational group which may have adverse consequences on the work of other occupational groups." This view was not applied in the *Financial Administration Case* (1981) Arbitral Awards file 185−2−257.

    For a discussion on the problem of making awards on reduction of hours, see above, Chapter 4, pp. 168−70.

    For a discussion of wage developments in the public service and their relationship to the factors set out in s. 68, see Chapter 8, above.

    One of the recurring problems in the establishment of wage rates in the public service is that negotiated or arbitrated rates may result in 'compression'. (See above, Chapter 8, pp. 385−86.) The arbitral awards that have been issued do not disclose what weight, if any, has been given by the Tribunal or the PSSRB to representations concerning this state of affairs. In the *Computer Systems Case* (1979) Arbitral Awards file 185−2−201, the Board merely noted that such representations had been made, and that all submissions made by the parties had been considered. An application by the bargaining agent to the Federal Court of Appeal, contending that the Board erred in law in considering these representations, was dismissed (Federal Court file A−315−79) (unreported).

65. S.C. 1974−75−76, c. 75.

66. (1976) Arbitral Awards file 185−2−122.

67. *Professional Institute of the Public Service of Canada, Biological Sciences Group and Forestry Group* v. *Administrator under the Anti-*

Inflation Act; Professional Institute of the Public Service of Canada, Agriculture Group v. *Administrator under the Anti-Inflation Act* (1978) 2 F.C. 30.

68. See above, Chapter 2, p. 43.

69. See PSSRA, paragraph 68(*a*).

70. See above, Chapter 2, p. 43.

71. The "needs of the public service for qualified employees" are recognized by section 13 of the PSCRA, which empowers the Governor in Council, on the recommendation of the Treasury Board, to substitute for a compensation plan, established in accordance with the Act, a different plan "where he considers it to be in the public interest to do so on grounds of labour shortages."

72. Leon Mitchell, "Interest Arbitration in the Federal Public Service", Address to Manitoba Bar Association Continuing Education Seminar, January 1978.

73. Concerning the right of a party to cross-examine the authors of statistical data prepared by the Pay Research Bureau or submitted in evidence by an opposing party, see below, Chapter 13, pp. 683–84. See also Chapter 10, note 75.

74. Quoted by Kenneth F. Walker, "Compulsory Arbitration in Australia" in Loewenberg *et al.*, *Compulsory Arbitration* . . . , p. 26. Brown, *Interest Arbitration*, p. 11, draws attention to what Professor Lon Fuller refers to as the 'polycentric' problems or function of the arbitrator in interest disputes: that there is involved "a complex of inter-related sub-issues so connected that decision on one issue necessarily affects and bears upon the subsequent disposition of the others." (See Lon Fuller, "The Forms and Limits of Adjudication" [unpublished manuscript, 1958].) The greater the 'polycentricity' of a case, the lesser the possibility that the award can be justified by reasoned argument. In his study Brown discussed various criteria that have been applied in interest arbitration (pp. 198–205) and concluded that "the porous nature of the leading 'criteria' well exemplifies the unsuitability of the problem to a form of reasoned decision-making." Indeed, unless the PSSRB can devise a technique for actually basing its awards on a combination of the factors set out in s. 68 of PSSRA, it finds itself using the factors to rationalize awards that are basically simply compromises.

75. In the *Secretarial, Stenographic and Typing Case* (1979) Arbitral Awards file 185–2–195, one of the issues raised related to the question whether the employer had encountered difficulties in recruiting personnel for the unit. An officer of the Public Service Commission was summoned, examined and cross-examined on the point in dispute.

76. The form letter also contained the following statement, which had application, of course, only during the currency of the Anti-Inflation Act:

    > Show the Maximum Permissible Increase in rates of pay allowable under the Arithmetic Guidelines of the Anti-Inflation Regulations and the calculations used to arrive at the results. Show separately the financial effect of any change in each Fringe Benefit which is in dispute on the Maximum Permissible Increase in rates of pay.

77. Leon Mitchell, "Comments on the Arbitration Process", released in June 1977 to the bargaining agents, the employer, and to members of divisions of the Board assigned to arbitration proceedings.

78. Barnes and Kelly, *Interest Arbitration*, p. 15, state: "In the 'typical' or median case, the Tribunal is left to arbitrate about five unsettled issues. The number of issues which it has been required to arbitrate, however, has ranged from as few as one (rates of pay) to as many as 33 (19 raised by the employer and 14 by the union)." It should be noted that one issue may involve a number of sub-issues; for example, the issue of leave may involve sick leave, bereavement leave, maternity leave, leave on birth or adoption of a child, education leave, and so on.

    For the fiscal years 1977–78 and 1978–79, the number of items referred to arbitration ranged from one to sixty, with a median of eight. The sixty items were referred by the Economists', Sociologists' and Statisticians' Association. The number of items 'dealt with' by the Board in this period, that is, held by the Board to be within its jurisdiction in making an award, ranged from one to twenty-seven, with a median of seven. In two references relating to hospital-services units (supervisory and non-supervisory), thirty-three items were referred, and only one was 'dealt with'. In a reference regarding an actuarial-science unit, the Board 'dealt with' one item out of seventeen referred. In the *Economics, Sociology and Statistics Case* referred to earlier (see note 63, above), the Board dealt with nineteen of the sixty items referred. The score in a secretarial, stenographic and typing unit was four out of seventeen. On the other hand, in a drafting and illustration unit, the Board dealt with twenty-seven out of twenty-seven items; in an auditing unit, twenty-one out of twenty-one items; in two general services units (supervisory and non-supervisory), sixteen out of sixteen; in a commerce unit, seventeen out of seventeen; in an administrative unit, sixteen out of sixteen; in a computer-systems unit, twenty-five out of thirty-four; and in a further economists' unit, fourteen out of seventeen.

79. Mitchell, "Interest Arbitration in the Federal Public Service".

80. The PSSRB usually reaches its decisions at meetings where all members of the division assigned to the matter are present. In the *Computer Systems Case* (see note 60, above), the bargaining agent challenged the Board's award in the Federal Court of Appeal. The agent alleged that the Board failed to exercise its statutory jurisdiction properly and erred in law by not holding a meeting at which all members of the division were present when the decision was made. The fact is that all members of the division were present in person during the whole time that the Board was considering its decision, although the 'appearance' sheet, an internal document recording the attendance of members, merely stated that the "Board" met on a certain day to consider its decision. The Court dismissed the application without calling on counsel for the employer or for the Board. In the course of argument by counsel for the bargaining agent, one member of the Court commented that a telephone conversation could be regarded as constituting a meeting of the Board.

81. Since the PSSRA came into force, there has been a reference back in thirteen cases.

82. For a discussion of the pros and cons relating to the giving of reasons and for the instances in which the Tribunal/Board did give reasons, see below, pp. 462–64.

83. See, in this connection, Chapter 9, p. 415, above.

84. See Chapter 4, p. 184, above.

85. S.C. 1978, c. 1.

86. Following a conciliation-board report: see (1978) Conciliation Board file 190–2–63.

87. See below, p. 470.

88. Mr. Justice Lucien Tremblay was appointed on 25 October 1978, as provided for by the Postal Services Continuation Act. During the mediation, some clauses that had been in dispute were agreed to, but others remained unresolved. The mediator-arbitrator issued his award on 31 March 1979. A reading of the award discloses that some matters that would not normally be arbitrable were dealt with in the award of the mediator-arbitrator. These included check-off of union dues, rights and responsibilities of union stewards, grievance procedure, technological change (see, in this connection, Chapter 4, pp. 178–80, above), health in the work environment, and surveillance of employees. Most of the matters dealt with in the award were within the general scope of arbitrable matters.

89. Raymond D. Horton, "Arbitration, Arbitrators, and the Public Interest" (hereafter referred to as "Arbitration, Arbitrators . . ."), 28 *Industrial and Labor Relations Review* (1975), pp. 499–50. See

also Chapter 1, pp. 5–6, above. The point is also made graphically by Charles M. Rhemus, "Legislated Interest Arbitration" in *Proceedings of the Twenty-Seventh Annual Winter Meeting, Industrial Relations Research Association* (Madison, Wis.: Industrial Relations Research Association, 1974), pp. 307–8, in outlining the position of those who:

> ...have challenged the delegation of governmental authorities' powers to appropriate funds to arbitration panels as unsound in principle because it strikes at the foundation of representative government. They contend that legislative responsibility and accountablity cannot be transferred in its entirety to a pro tem appointed board. This view is perhaps epitomized in the dissenting opinion of the city's member of an arbitration board appointed in one of the earliest arbitration awards rendered in Michigan. He asked, "Who elected the arbitration panel of which I am a part? To whom is this panel responsive? What pressures can the citizens . . . bring to bear on the panel? How do they express their satisfaction or dissatisfaction with the decision?"

90. J. Finkelman, "The Scope of Bargaining in the Canadian Public Service" in *Proceedings of the International Symposium on Public Employment Labor Relations* (1971) pp. 68–69.

91. PSSRA, paragraph 68 (*b*).

92. For some interesting comments on the distribution of resources, see Horton, "Arbitration, Arbitrators . . .", pp. 453–55.

93. See above, Chapter 8 for a discussion of the PSCRA and note 32 in that chapter for an account of the wage-restraint programs in the provinces.

94. Brown, *Interest Arbitration*, pp. 260–61. For comments by other observers, see Loewenberg *et al.*, *Compulsory Arbitration*, p. 159; Arvid Anderson, "Lessons from Interest Arbitration in the Public Sector: The Experience of Four Jurisdictions" in *Arbitration — 1974: Proceedings of the Twenty-Seventh Annual Meeting, National Academy of Arbitrators* (Washington, D.C.: The Bureau of National Affairs, 1975), pp. 60–61; John C. Anderson and Thomas A. Kochan, "Impasse Procedures in the Canadian Federal Service: Effects on the Bargaining Process", 30 *Industrial and Labor Relations Review* (1977), p. 283. See also Harry W. Arthurs, *Labour Disputes in Essential Industries*, Task Force on Labour Relations, Study No. 8 (Ottawa: Queen's Printer, 1970), p. 85 ff.

95. In this connection it may be of interest to consider the frequency of resort to arbitration for units whose bargaining agents have specified reference to arbitration as the applicable dispute-resolution process; this point is discussed below, pp. 456–57.

96. See Loewenberg *et al.*, *Compulsory Arbitration*, p. 190; Joan Zeldon McAvoy, "Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector", 72 *Columbia Law Review* (1972), pp. 1209–10 (hereafter referred to as "Binding Arbitration").

97. Barnes and Kelly, *Interest Arbitration*, p. 15. See also note 78, above.

98. See Brown, *Interest Arbitration*, p. 218.

99. See *Canadian Industrial Relations: Report of the Task Force on Labour Relations* (Ottawa: Queen's Printer, 1969), p. 120, and McAvoy, "Binding Arbitration. . . ." In assessing the extent to which there has been a 'holding back' in bargaining under the PSSRA, we might note the limited number of issues which, in most cases, are left to arbitration where that process is resorted to. See note 78, above. In recent years, since the government embarked on an austerity program to combat inflation, there has been a distinct tendency on the part of the employer to 'hold back' in respect of fringes, even in situations where 'concessions' had previously been granted in arbitral awards to employees in other bargaining units. The attitude of the employer's representatives appears to be that if such a 'concession' is to be granted, it would be through resort to arbitration.

100. See pp. 475–76, below.

101. See, for example, W. Willard Wirtz, "The Challenge to True Collective Bargaining" in *Labor Arbitration and Industrial Change, Proceedings of the Sixteenth Annual Meeting, National Academy of Arbitrators* (Washington, D.C.: The Bureau of National Affairs, 1963), pp. 303–4. A contrary view was indicated by James L. Stern, in assessing the impact of arbitration on negotiations in the British non-industrial civil service: "Labor Relations in the Public Sector: Arbitration of Wage Disputes in the British Non-Industrial Civil Service" in *Proceedings of the Spring Meeting of the Industrial Relations Research Association* (Chicago: Commerce Clearing House, 1973), p. 497.

102. In the address referred to on pp. 429–30, above, Leon Mitchell stated that up to 31 March 1982, 188 disputes had been resolved by arbitration. This figure represents 20.2 per cent of the total of 930 'agreements' entered into under both dispute-resolution processes.

103. The statistics deal only with cases in which there was a formal appointment of a conciliation officer or mediator. In a number of other instances, the Office of Mediation Services assisted the parties informally.

104. For example, firefighters and lightkeepers. For a discussion of 'essential services', see below, p. 483 ff. In almost all instances,

references in this category involved one reference for a supervisory unit and one reference for a non-supervisory unit.

105. Agriculture, biological sciences, commerce, computer-systems administration, information services and firefighters.

106. Auditing.

107. Architecture and town planning; economists, statisticians and sociologists; mathematics; and purchasing and supply.

108. Clerical and regulatory, communications, computer-systems administration, correctional (supervisory), correctional (non-supervisory), data processing, defence scientific services, engineering and scientific support, general labour and trades (supervisory), general labour and trades (non-supervisory), general services (supervisory), general services (non-supervisory), hospital services (supervisory), hospital services (non-supervisory), library science, meteorology, nursing, radio operations, research officers and Research-Council officers of the National Research Council, veterinary science, ships' officers, in addition to those listed in note 109, below.

109. Education, firefighters (supervisory), firefighters (non-supervisory), historical research, photography, programme administration, scientific regulation and scientific research.

For comparable statistics on the frequency of resort to a conciliation board, see pp. 473–74, below.

110. See below, p. 473.

111. See Table 8.

112. Brown, *Interest Arbitration*, p. 15. See also, Rhemus, "Legislated Interest Arbitration", p. 311.

113. See above, Chapter 8, pp. 393–95.

114. Barnes and Kelly, *Interest Arbitration*, p. 21.

115. It could also be argued, of course, that despite the belief of a party in the justice of its case, it was mistaken or may have failed to present evidence or argument that would convince the Tribunal or, later, the PSSRB that a departure from 'precedent' was warranted. It is not unfair to say that the parties often leave something to be desired in the briefs they submit in arbitration proceedings, both on pay (see, in this connection, pp. 444–45, above) and on non-pay issues. However, the situation has improved since the issue of the directive in 1977 that was referred to on pp. 445–46, above.

116. See Chapter 4, above.

117. See Chapter 4, pp. 158–61, above.

118. See Chapter 4, pp. 156–57, above.

In addition, on a number of occasions, where the employer has challenged the Board's jurisdiction to deal with a certain matter, the Board has rejected the proposal of the bargaining agent on the merits of the proposal and refrained from expressing any opinion on the jurisdictional issue.

119. See Chapter 4, pp. 162–63, above. See also Chapter 10, pp. 470–71, below.

120. See Chapter 4, pp. 163–64, above.

121. See above, pp. 446–47.

122. The first chairman of the Public Service Arbitration Tribunal was Mr. Justice André Montpetit of the Quebec Superior Court, who served on a part-time basis until 1972. Towards the end of 1970, two alternate chairmen, Judge Walter Little, a judge of the Ontario County Court, and Dr. A.W.R. Carrothers, then president of the University of Calgary, were also appointed on a part-time basis. Mr. Justice Montpetit resigned at the end of 1971 and was replaced by Judge René Lippé, at the time a judge of the Quebec Provincial Court. Judge Little was replaced in 1973 by Owen Shime, a former vice-chairman of the Ontario Labour Relations Board. All served on a part-time basis. In January 1975 Georges E. Gauthier, who had resigned at the end of 1974 as vice-chairman of the PSSRB, was appointed an alternate chairman of the Tribunal on a full-time basis. When the arbitration function was transferred to the PSSRB (see Chapter 13, pp. 666–67, below) Mr. Gauthier was appointed a deputy-chairman of the Board with the same responsibilities. Mr. Gauthier retired in July 1976, and Leon Mitchell, who had been appointed a deputy-chairman of the Board, was assigned responsibility for administering the arbitration function. Several of the alternate chairmen were maintained in office as part-time members of the Board, and several new part-time members were appointed to devote themselves primarily to the arbitration function.

123. See Barnes and Kelly, *Interest Arbitration*, p. 22.

124. Bill C–28 would have required the PSSRB, in making an award, to do so in writing (s. 6); the award was to "be accompanied by the reasons for the making of such award in relation to (*a*) the factors to be taken into account [that is, the factors referred to above, pp. 442–43]; and (*b*) the written submissions of the parties with respect to the matters referred to arbitration." Bill C–22 (s. 6) required the Board to give reasons for the making of an award only on request of either of the parties and then only "in respect of those matters in dispute that relate to compensation". The reasons were intended to cover the same points as were set out in Bill C–28.

125. See above, pp. 447–48.

126. Support for this view is to be found in the conclusions of Otto Kahn-Freund, *Labour and the Law* (2d ed.) (London: Stevens,

1972), pp. 106–8, in discussing the experience of the Central Arbitration Committee (formerly the Industrial Arbitration Board) in the United Kingdom. The author quotes the evidence, given to the Donovan Commission by the chairman of the Civil Service Arbitration Tribunal, that on numerous occasions that body had "no difficulty in reaching agreement on the conclusion but there would have been considerable difficulty in reaching agreement on the reasons." The author comments that "To publish 'concurrent' opinions (as is done in collegial courts in common law countries) would be as disastrous as the publication of 'dissenting' opinions of the members of a body deliberately designed to reflect divergent interests."

127. Although Bill C–28 and Bill C–22 required the Board to give written reasons for an award (see note 124, above), they did not propose any change in the provision of the PSSRA barring the expression of dissenting views.

128. (1971) Arbitral Awards files 185–2–15 and 185–2–16.

129. (1977) Arbitral Awards file 185–2–147.

130. A number of other awards in which reasons were given include the following: *Economists', Sociologists' and Statisticians' Case* (1977) PSSRB file 185–2–154; *Actuarial Science Case* (1977) PSSRB file 185–2–160; *Engineering and Land Survey Case* (1980) Arbitral Awards file 185–2–227.

131. The citation for the arbitral award concerned is (1978) Arbitral Awards file 185–2–184.

132. (1979) 1 S.C.R. 684 at 705–6.

133. (1982) Arbitral Awards file 185–5–274.

134. *Proceedings of the Miscellaneous Estimates Committee*, p. 88:41.

135. Bill C–124, subsec. 2 (1).

136. It has been suggested that arbitration, even on standards of discipline, is barred by the PSCRA since 'compensation' is defined to include perquisites provided directly or indirectly by or on behalf of an employer for the benefit of an employee, and 'compensation plan' is defined to include provisions for the administration of compensation. We submit, however, that even assuming that standards of discipline were to be regarded as a 'perquisite', the meaning of the words 'benefit of an employee' must be construed in light of the words 'pay, benefits and perquisites', and that 'standards of discipline' is not an item comprehended in the definition of the term 'compensation'.

137. See above, pp. 439–40.

138. See below, discussion of 'essential services', p. 483 ff.

139. Under the early private sector legislation in the 1940s and for some considerable time afterwards, the appointment and report

of a conciliation board were mandatory conditions before a lawful strike or lock-out could occur. Gradually most jurisdictions in Canada concluded that the establishment of such a board helped to delay the resolution of bargaining impasses and amended their legislation to vest in the Minister of Labour a right to decide whether a board would be appointed; the right to strike or lock out became effective immediately if the Minister denied a request for the establishment of a conciliation board.

140. See subsec. 61(1) and paragraphs 13(1)(*d*) and 80(*b*).

141. In that event, the employees would be entitled to strike forthwith.

142. A similar course was also followed in 1978 in connection with a dispute between PSAC and the Northern Canada Power Commission, where the parties sought to have the assistance on a conciliation board of Dr. Kenneth Pugh, former Deputy Minister of Labour of Alberta, who was over the eligible age for appointment as chairman of a conciliation board.

143. A provision requiring the Minister of Labour to deliver terms of reference to the members of a conciliation board is also to be found in the Canada Labour Code and in several of the provincial labour-relations statutes. However, we are not aware of instances in which a Minister has done more, in formulating terms of reference, than simply deliver to the board the application of the applying party and the response of the other party.

144. For a discussion of the Chairman's rulings on questions of the referability of certain proposals, see above, Chapter 4, *passim*. See the *Finkelman Report*, Part I, pp. 143–44, for a recommendation that the responsibility for framing the terms of reference to a conciliation board be transferred from the Chairman of the PSSRB to the Board itself.

145. *Canadian Union of Postal Workers* v. *Brown et al.* (1980) 2 F.C. 435 at 438. See also *General Services Case* (1981) Conciliation Board file 190–2–104.

146. Thus Irving Gaul, a nominee of the bargaining agent in a dispute between the employer and CUPW, in (1975) Conciliation Board file 190–2–43, devoted a good deal of his minority report to a diatribe against what he regarded as inadequacies in the PSSRA.

147. See above, Chapter 4, p. 177. See also J. Finkelman, "New Dimensions in Dispute Resolution", *1976 Proceedings, Fourth Annual Meeting, Society of Professionals in Dispute Resolution*, pp. 197–98.

148. For example, the Canada Labour Code provides (R.S.C. 1970, c. L–1, s. 169, as amended by S.C. 1972, c. 18, s. 169):

> After a conciliation commissioner or conciliation board has made its report . . .

(*a*) the Minister may forthwith direct the conciliation commissioner or conciliation board to reconsider and clarify and amplify any part of his or its report; and

(*b*) the report of the conciliation commissioner or conciliation board shall be deemed not to have been received by the Minister until the revised report is received by him.

149. Pp. 475–76, below.

150. The functions of a conciliation board in Canada may differ from the functions of a fact-finder or a fact-finding board in some jurisdictions in the United States. In some instances a fact-finder is precluded from mediating and, in others, from making recommendations. Jeffrey B. Tener in "Fact-Finding in the Public Sector: An Overview" (New York: American Arbitration Association, National Center for Dispute Settlement), has pointed out that:

> The name "fact-finding" implies an objective process in which facts are discovered. Actually, the term is a misnomer. The parties are generally well aware of the facts. Their problem is that they are unable to strike a bargain. The fact-finder is called upon to examine and consider the facts, undoubtedly on a somewhat selective basis, in order to support his recommendations to the parties (if called upon to make such recommendations).

Arthurs, *Labour Disputes in Essential Industries* (p. 170), points out that in practice, in jurisdictions providing for fact-finding, "there has been a tendency to develop, and to 'sell' to the parties, acceptable formulae for agreement without regard to [their] fairness and without particular concern for ascertaining 'facts'."

151. See above, p. 450.

152. It has been the practice for some years now to delay the release to the press of a conciliation board's report for twenty-four hours after it has been delivered to the parties, or for such longer period as may be agreed on by the parties. The purpose of the delay is to enable the parties to acquaint their constituents with the contents of the report. Before this practice was introduced, there had been occasions when members of the press interviewed local officers of a bargaining agent and asked for their comments on a report that those officers had not had the opportunity to examine. Ill-informed comments by officers in such circumstances have, at times, proved less than helpful in the resolution of a dispute.

153. The *Finkelman Report*, Part I, pp. 144–45, recommended that to assure the public that every effort had been made to effect a settlement of a dispute before a strike occurs, the interval between the release of the report of the conciliation board and the

time when a lawful strike may commence be extended to fourteen days. The *Report* also recommended that where the Chairman refuses to establish a conciliation board, twenty-one days should elapse between the request for the establishment of such a board and the commencement of a lawful strike. The longer period in the latter case was based on the difficulties that might arise in notifying employees that they had been designated.

154. An exception was the strike of employees of the Post Office in 1968.

155. See above, p. 467.

156. A number of these references involved the Council of Postal Unions and, since 1975, LCUC and CUPW as separate bargaining agents. One of the references involved the revenue post-office unit for which the bargaining agent is the Canadian Postmasters' and Assistants' Association. See Table 8.

157. Four of the references involved the employees in a national ship-repair unit, and one involved the ship-repair unit on the east coast and one the corresponding unit on the west coast. See Table 8.

158. In some instances a bargaining agent represents both a supervisory unit and a non-supervisory unit in an occupational group in the operational category. In practically all such situations, the bargaining agent made a reference to a conciliation board for both units on the same date, and one conciliation board dealt with the two units at the same time. In the statistics in the text, the reference for each unit has been treated as a separate item.

159. See pp. 456–57, above.

160. See pp. 476–77, below.

161. See pp. 465–67, above.

162. (1982) Conciliation Board file 190–2–112. Subsection 70(1) of the PSSRA, on which the Board relied in part in the *Administrative Services Case* (see p. 465, above), does not apply to the conciliation-board process, but the other views expressed in that case do apply.

163. This section deals with the circumstances in which employees may engage in a lawful strike. For a discussion of unlawful strikes, see Chapter 12, p. 636 ff., below.

164. For a discussion of the development of the policy regarding the inclusion in the legislation of provisions permitting strikes, see Chapter 1, p. 13, above.

165. Regarding designated employees, see below p. 483 ff.

166. See discussion in Chapter 3, p. 123, above, concerning the claim of a successor bargaining agent to rely on conciliation-board

proceedings in which the predecessor bargaining agent had engaged as giving the successor the right to call a lawful strike without having to go through another conciliation proceeding.

167. See note 153 above.

168. See note 153, above.

169. The *Finkelman Report*, Part I, p. 147.

170. Compare the New Brunswick Public Service Labour Relations Act, R.S.N.B. 1973, c. P–25, which declares in subsec. 102(3) that if certain conditions are satisfied, "employees may strike".

171. See *Postal Operations Lock-Out Case* (1970) PSSR Reports K 565 at K 571.

172. The wording of the definition of the term 'strike' in any labour-relations statute must be examined carefully to ascertain whether, in any particular set of circumstances, the withdrawal of services by employees constitutes a strike. In *British Columbia Hydro and Power Authority and International Brotherhood of Electrical Workers et al.* (1976) 2 Canadian L.R.B.R. 410, the British Columbia Labour Relations Board (BCLRB) was called upon to deal with a threatened withdrawal of services by employees on 14 October 1976. That date was declared by the Canadian Labour Congress as a National Day of Protest to demonstrate the opposition of trade unions in Canada to the federal anti-inflation program. One of the issues for the BCLRB was whether such actions would constitute a strike within the meaning of the British Columbia Labour Code. The Code (R.S.B.C. 1979, c. 212, s. 1[1]) defines the term as including:

> (a) a cessation of work;
> (b) a refusal to work;
> (c) a refusal to continue to work; or
> (d) an act or omission that is intended to, or does restrict or limit production or services,
>
> by employees in combination, or in concert or in accordance with a common understanding, for the purpose of compelling their employer to agree to terms or conditions of employment . . . of his employees. . . .

The Board held that the threatened withdrawal of services had a political, rather than a collective bargaining purpose and therefore did not amount to a 'strike' within the precise legal meaning of that term under the Labour Code (p. 413). On the other hand, the Ontario Labour Relations Board, in *Domglas Ltd. and United Glass and Ceramic Workers of North America et al.* (1976) 2 Canadian L.R.B.R. 394, held that a threatened work stoppage in similar circumstances would constitute a strike under the Ontario Labour Relations Act, where the definition of the term 'strike' was identical with that in the PSSRA.

173. There was a rotating strike in the Post Office in 1970 that continued for 101 days.

174. For example, a strike by employees in supervisory and non-supervisory general labour-and-trades bargaining units in February and March 1975. These employees manned heavy-duty equipment for the removal of snow on airport runways.

175. There may have been suggestions in some instances that legislation might be introduced to bring pressure to bear on a bargaining agent, but there were no official announcements of such action, if such a threat was ever actually made.

176. See Air Traffic Control Service Continuation Act, S.C. 1977, c. 57.

177. See Postal Services Continuation Act, S.C. 1978, c. 1.

178. S.C. 1976–77, c. 33, as amended.

179. *Regina* v. *Parrot* (1979) 27 O.R. (2d) 333. For other aspects of the Postal Services Continuation Act, see above, pp. 452–53.

180. S.C. 1977–78, c. 23, s. 2. No election was called during the period for which the statute was applicable. In 1979 the government was defeated on the 13 December; the House was dissolved the next day, and an election was called. A request for the establishment of a conciliation board was made by CUPW on 17 December. In the circumstances there was no opportunity to enact legislation similar to the 1978 Act. However, the conciliation board did not report until well after the date of the return of the writs and, indeed, until some time after a new session of Parliament commenced.

    The *Finkelman Report* (Part I, p. 148) had recommended in 1974 that there be included in the legislation a provision, similar to that which had been included in the Canada Labour Code (R.S.C. 1970, c. L–1, s. 181, as amended by S.C. 1973, c. 18, s. 2), empowering the PSSRB to suspend the right to strike during the period between Parliaments if the strike, in the opinion of the Board, "would adversely affect the national interest if it occurred." Bill C–28 of 1978 would have implemented this recommendation, but with the modification that the suspension order be made by the Governor in Council, rather than by the Board. The Bill died on the order paper. A similar provision also appeared in Bill C–22, introduced in the fall of 1978. The Bill was not enacted before Parliament was dissolved.

181. (1970) PSSR Reports K 565. See also K 566 and K 578.

182. (1979) PSSRB file 161–2–195.

183. See note 181, above.

184. See note 182, above.

185. In its decision, the Board noted that it had earlier determined the numbers, positions and locations of the employees designated (that is, the employees engaged in duties necessary to the safety or security of the public), as well as the duties and functions they were required to perform in the event of a strike. The Board went on as follows:

> This being so, in the event of a strike, there is no need for the services of non-designated employees who are prepared to perform only those duties and functions specified for the safety or security of the public and for which the necessary number of employees already has been designated. In short, the performance of such duties by them would be entirely superfluous. It is unnecessary, impractical and indeed wasteful for non-designated employees to duplicate those duties and functions already being performed by the designated employees who receive their full salary for the performance of those duties and functions.

186. (1980) PSSRB file 161−2−125.

187. Part I, pp. 154−55.

188. See, for example, Kahn-Freund, *Labour and the Law*, p. 236. See also *Electronics Application for Consent to Institute Prosecution Case No. 2* (1972) PSSR Reports K 957, at K 958.

189. Arthurs, *Labour Disputes in Essential Industries*, pp. 1−2.

190. Even before the PSSRA was enacted, some provincial jurisdictions identified particular essential services and prohibited strikes by employees involved in those services, as well as the lock-out of such employees by their employers. These prohibitions applied, for example, to policemen, firefighters and hospital employees. In addition, several jurisdictions, including New Brunswick, the Yukon, British Columbia, Alberta, Newfoundland and Quebec, have enacted legislation providing a process whereby specified essential services are to be maintained in the event of a strike. The relevant legislation will be examined in our next work.

191. (1972) PSSR Reports K 839.

192. (1975) PSSRB file 181−2−35.

193. (1982) PSSRB file 181−2−162.

194. The time for objections is fixed by the PSSRB's *Regulations and Rules of Procedure* (subsec. 46[3]) at not later than the twentieth day after the bargaining agent has received the employer's list from the Registrar. However, the time may be — and in many cases has been — extended by the Board (*Regulations and Rules of Procedure*, subsec. 89[1]).

195. See Urie J. in *Attorney-General of Canada and Public Service Staff Relations Board* (1977) 1 F.C. 56 at 61. For a discussion of the filing

of a 'preliminary list' to enable a bargaining agent to determine which process it should specify, see pp. 427–28, above. The 'preliminary list' is not subject to challenge before the PSSRB.

196. With very few exceptions, the designation process has been resorted to in connection with bargaining units for which the Treasury Board represents the employer. Of the separate employers, the process has been resorted to in dealing with an operational unit of the Northern Canada Power Commission, a research-officer and Research-Council-officer unit of the National Research Council, and an operational unit of the Defence Research Board; the last-mentioned case occurred during the period when that Board was listed as a separate employer under Part II of Schedule I of the PSSRA. In 1968 all employees comprising a communications unit of the National Research Council were designated. Subsequently the employees in the unit were transferred to the Department of National Defence and ultimately to the Communications Security Establishment of the Department of National Defence, which was established as a separate employer. The dispute-resolution process specified for this unit was then altered to reference to arbitration.

197. (1980) PSSRB file 181–2–115.

198. Failure to file an objection at this stage precludes objection at a later stage.

199. *Sixth Report* (1976), p. 47:14.

200. See, for example, *General Labour and Trades Cases* (1972) PSSRB file 181–2–21 and (1974) PSSRB file 181–2–34. In the *Clerical and Regulatory Case* (1980) PSSRB file 181–2–114, the bargaining agent, after agreeing to the designation of about 3000 employees, withdrew its objection to the designation of over 4000 additional persons under a similar reservation.

201. In a designation proceeding involving employees in a hospital-services unit, the employer included a gardener on its list of proposed designates. At a critical point in the bargaining, the bargaining agent agreed to the employer's list in an attempt to avoid delay in the establishment of a conciliation board. In response to a letter to the PSSRB from the gardener, questioning the validity of his designation, the Secretary of the Board could do no more than reply that the Board had no jurisdiction to override the bargaining agent's 'concurrence' in the employer's proposal.

202. Part I, pp. 136–38.

203. *Sixth Report* (1976), pp. 47:14–47:15.

204. See, for example, *Air Traffic Control Case No. 2* (1968) PSSR Reports K 161, K 162. Agreement in some cases has probably

been brought about by decisions of the Board in similar or related cases. The *Finkelman Report, Supplementary Observations*, p. A–2, comments that:

> ...the Board has trod the path generally regarded by most practitioners in the field of industrial relations on both sides of the fence to be the ideal one, namely, to leave as much as possible to the parties [as, indeed, the legislation provides in respect of designation] and to inject itself into a situation only when and where the parties have been unable to agree.

205. (1975) PSSRB file 181–2–35.

206. In the PSSRB files relating to designation proceedings, the nature of the duties that, in the employer's opinion, warrant designation of the employees who perform them is set out, usually in the form of a capsule summary. This is true both of the earlier cases and also of the later cases in which resort is made to the designation process after the dispute-resolution process for the unit has been altered from reference to arbitration to reference to a conciliation board. Where the bargaining unit has previously been involved in a designation proceeding, it seems to have been assumed by the employer in some, but not all, cases that the bargaining agent is aware of the reasons for the employer's proposal. The list furnished by the employer, therefore, may not contain, or be accompanied by, any identification of duties, except where the employer seeks to designate a group of employees performing duties that have not previously been claimed to warrant designation.

207. See *Air Traffic Control Case No. 2* (note 204, above) at K 162. As we shall see below, the name list is required to enable the PSSRB to inform each employee concerned that he has been designated (subsec. 79[5]).

208. In some instances the bargaining agent has requested that a tentative name list be furnished at this point to enable it to assess the situation adequately, and such a list has been supplied by the employer.

209. For example, a sufficient number of air-traffic controllers to provide air-traffic-control services to aircraft in difficulty and to regulate and handle traffic of light aircraft in the immediate vicinity of airports: *Air Traffic Control Cases* (1968) PSSRB file 181–2–3 and (1969) PSSRB file 181–2–9. See also *Radio Operations Case* (1975) PSSRB file 181–2–39. Other examples include the following: radio operators to guard distress and safety frequencies, to monitor the accuracy of electronic navigational aids, and to issue notice of abnormal operations, *Radio Operations Case*, above, and (1979) PSSRB file 181–2–99; helicopter pilots required for search and rescue and emergency situations such as

emergency evacuations, *Aircraft Operations Cases* (1975) PSSRB file 181−2−42 and (1978) PSSRB file 181−2−110; ships' crews on ice-breakers engaged in flood control on the St. Lawrence River, *Ships Crews Case* (1970) PSSRB file 181−2−10; firefighters who provide service at airports, at veterans' hospitals and in remote and other locations, such as town sites in national parks, where the government provides complete fire service, *Firefighters Case* (1972) PSSRB file 181−2−19; tradesmen in general labour-and-trades bargaining units who control gates at dams to prevent serious flooding downstream and danger to life, *General Labour and Trades Case* (1972) PSSRB file 181−2−21.

210. Examples include the provision of air-traffic-control services for rescue operations and emergency flights, including the delivery of emergency supplies (such as food, medical aid and medicines), for hospital aircraft, mercy flights, and those engaged in fighting forest fires (see, for example, *Air Traffic Control Cases* and *Radio Operations Cases*, note 209, above), electronic technicians in the workshops necessary to maintain essential marine beacons and lighthouse communications, as well as radio-communications frequencies for messages pertaining to safety or security, *Electronics Case* (1971) PSSRB file 181−2−16.

In a number of instances, employees have been designated, on agreement of the parties, to keep fire lanes open during the winter months to give firefighting equipment and their crews access to any fire that might break out, *Defence Research Board Operational Category* (1972) PSSRB file 181−2−20; *General Labour and Trades Cases* (1975) PSSRB file 181−2−34 and (1977) PSSRB file 181−2−75). So, also, employees in the heating, power and stationary plant-operations bargaining unit have been designated to supply heat to buildings in which personnel were performing duties necessary to the safety or security of the public, *Heating, Power and Stationary Plant Operations Case* (1974) PSSRB file 181−2−32.

211. As far as the Department of National Defence is concerned, employees in the following bargaining units have been designated: air-traffic control (1968) PSSRB file 181−2−3 and (1978) PSSRB file 181−2−105; electronics (1969) PSSRB file 181−2−8 and (1971) PSSRB file 181−2−16; radio operations (1971) PSSRB file 181−2−11; heating, power and stationary plant operations (1972) PSSRB file 181−2−18 and (1976) PSSRB file 181−2−60; firefighters (1972) PSSRB file 181−2−19; ship repair (1972) PSSRB file 181−2−24; meteorology (1975) PSSRB file 181−2−40; social work (1976) PSSRB file 181−2−57; nursing (1976) PSSRB file 181−2−71; general labour and trades (1977) PSSRB file 181−2−75; translation (1978) PSSRB file 181−2−93; printing operations (employees performing an essen-

tial function in the production of national and international material vital to the security of the country at all times) (1971) PSSRB file 181–2–14 and (1978) PSSRB file 181–2–86; photography (trials, tests and experiments involving explosives, which cannot be delayed once placed in trial position since instrumented photography is an essential part of instrumentation) (1975) PSSRB file 181–2–44; occupational and physical therapy (occupational and physical therapists at military hospitals to aid in the speedy recovery of patients) (1978) PSSRB file 181–2–92 and (1979) PSSRB file 181–2–102; data processing (to process coded messages for national security and defence, military personnel information, and the Canadian Forces' supply system) (1980) PSSRB file 181–2–116.

To support the Royal Canadian Mounted Police (RCMP), employees have been designated in the following bargaining units: radio operations (1971) PSSRB file 181–2–11; electronics (1971) PSSRB file 181–2–16; heating, power and stationary plant operations (to supply heat to buildings in which RCMP personnel are stationed) (1972) PSSRB file 181–2–18; printing operations (to disseminate information on criminal activities) (1971) PSSRB file 181–2–14 and (1976) PSSRB file 181–2–51); data processing (identification support for police forces and information required by police) (1980) PSSRB file 181–2–116; general labour and trades (1977) PSSRB file 181–2–75.

As far as the Canadian Penitentiary Service is concerned, the bargaining agent for the employees in the correctional bargaining units, supervisory and non-supervisory, who have the custody and control of inmates in institutions of the Penitentiary Service, specified reference to arbitration as the applicable dispute-resolution process in several rounds of bargaining. In 1976 the bargaining agent altered the process for the bargaining unit to reference to a conciliation board. In the ensuing round of bargaining, the employer proposed the designation of all employees in both the supervisory and non-supervisory correctional bargaining units; the employer gave as its reason for so doing the need to control inmates, to administer sentence, and to ensure the safety of the public and of institutional personnel. The bargaining agent filed an objection, but a collective agreement was entered into, and no determination regarding designation was made (1977) PSSRB files 181–2–62 and 181–2–63. In the next round of bargaining, the course of events was the same as in the previous round (1978) PSSRB file 181–2–82. For a discussion of the reasons that led the bargaining agent to specify reference to a conciliation board as the appropriate dispute-resolution process for employees in the correctional units, where it was likely that the PSSRB would designate most of the employees, see above, note 23. In the *Education Case* (1971)

PSSRB file 181−2−15, the 'justification' offered by the employer for designating employees in the bargaining unit who perform duties in the penitentiaries was that:

> ...the inmates incarcerated in institutions across Canada can be expected to react unfavourably against any act that changes their usual routine such as these employees going on strike. This could result in inmates taking part in riots, assaults and escapes which could endanger the safety of the public. These employees have also received training in both riot control and escape-search techniques. In the event of an insurrection or disturbance within prison walls, or in the event of escapes, these employees are called to assist in quelling a disturbance or to search for an escapee with a view to apprehending him.

The same or similar justification has been given for the designation of employees engaged in penitentiaries as electronics instructors, *Electronics Case* (1971) PSSRB file 181−2−16. Employees in penitentiaries have been designated in the following bargaining units: heating, power and stationary plant operations (1972) PSSRB file 181−2−18; photography (1975) PSSRB file 181−2−44; engineering and scientific support (1977) PSSRB file 181−2−70 and nursing (1976) PSSRB file 181−2−71. The bargaining agent objected to a proposal by the employer to designate a number of employees in the psychology bargaining unit, and the proposal was withdrawn by the employer (1976) PSSRB file 181−2−56. The problems involved in the designation of employees in the Penitentiary Service were discussed at some length in the *Nurses Case* (1980) PSSRB file 181−2−115, where the parties were unable to reach agreement on designation.

212. For example, nursing care in veterans' hospitals to ensure the health and safety of patients who cannot be discharged, nursing care for patients in penal institutions, and emergency patient care for armed forces personnel (1975) PSSRB file 181−2−35 and (1976) PSSRB file 181−2−71 (in the last case, the parties agreed to designate a number of nurses to provide care for participants in the Commonwealth Games); occupational and physical therapy to aid patients in veterans' and other hospitals following surgical procedures and patients suffering acute respiratory distress and acute cardio-vascular conditions, and to promote the speedy recovery of patients (1976) PSSRB file 181−2−52 and (1978) PSSRB file 181−2−92; radio operators to provide medical advice to ships at sea (1975) PSSRB file 181−2−39 and (1979) PSSRB file 181−2−99; employees to provide heat and power to hospitals operated by the Department of National Health and Welfare in veterans' hospitals (1971) PSSRB file 181−2−18 and (1976) PSSRB file 181−2−60; veterinarians to test animals for certain contagious diseases and to prevent spread of diseases to humans

and animals (1973) PSSRB file 181−2−26 (see below, pp. 492−93 concerning designation of employees in the meat-inspection division); certain employees in the scientific research bargaining unit engaged in the diagnosis of diseases in animals and in testing the efficiency of toxic materials and the efficiency and quality of drugs in connection with food poisoning (1975) PSSRB file 181−2−30.

The *Finkelman Report*, Part I, p. 148, recommended that the PSSRA be amended to make it clear that the designation principle applied to those persons the withdrawal of whose services would pose an imminent threat to the health of the public or would jeopardize long-term experiments related to the safety, security or health of the public. The Special Joint Committee on the *Finkelman Report* (*Sixth Report*, p. 47:14) concurred in these recommendations and would have extended the one concerning experiments to all important experiments.

213. For example, electronic technicians have been designated at embassies to maintain essential classified communications services on an international basis, *Electronics Designated Employees Case No. 1* (1969) PSSR Reports K 394 at K 395−K 396; employees in the communications unit required for essential communications services relating to urgent consular cases involving Canadian citizens abroad and needed to operate cyphering equipment (1971) PSSRB file 181−2−12 and (1976) PSSRB file 181−2−48; employees in the data-processing unit to provide service to the passport office (1980) PSSRB file 181−2−116; employees in the printing-operations unit, required to produce orders, instructions and policy statements on a daily basis for Canadian missions, and to prepare briefing books for high-level Canadian officers proceeding on foreign visits (1978) PSSRB file 181−2−86; the provision of heat by stationary engineers to the Canadian Embassy in Washington (1976) PSSRB file 181−2−60.

214. To provide such care, the parties have agreed to designations in the following situations: radio operators designated to provide service to joint arctic weather stations in remote areas where radio is the only means of communication, and to provide communications for isolated communities and lighthouses (1968) PSSRB file 181−2−6 and (1975) PSSRB file 181−1−39; nurses in the northern services, at isolated posts and at Native hospitals (1976) PSSRB file 181−2−71; social workers and occupational and physical therapists for patients in hospitals operated in isolated communities by the Department of National Health and Welfare (1976) PSSRB file 181−2−57 and (1978) PSSRB file 181−2−92; ships' crews to provide transportation from Christian Island (a Native reserve in Georgian Bay) to a hospital on the mainland (1972) PSSRB file 181−2−22; tradesmen in the general labour-

and-trades bargaining units for isolated posts and Native groups (1972) PSSRB file 181–2–21 and (1977) PSSRB file 181–2–75; and employees to supply heat to structures in northern communities and institutions (1972) PSSRB file 181–2–18.

215. Included in such designations have been employees in the following bargaining units: ships' crews (1970) PSSRB file 181–2–10; electronics technicians on board weather ships (*Electronics Designated Employees Case No. 1*; see note 213 above, at K 397) and technicians in workshops on shore, necessary to maintain weather ships (1971) PSSRB file 181–2–16. In the *Radio Operations Case* (1971) PSSRB file 181–2–11, the PSSRB designated radio operators engaged in the operation of weather ships, which included preparation for going to sea. In another *Radio Operations Case* (1979) PSSRB file 181–2–99, the parties agreed to designate employees to broadcast ice information and to collect ice and meteorological information from ships at sea and to relay it to meteorological service centres.

216. *Supplementary Observations and Recommendations*, A–3. Thus, in the *Heating, Power and Stationary Plant Operations Case* (1974) PSSRB file 181–2–32, the parties agreed that designated members of the bargaining unit concerned would make reasonable efforts to ensure that certain buildings would be sufficiently heated to prevent damage to their structure and to the heating equipment and the conduits they contained. These were buildings, heated from a central heating plant, that employees were designated to keep in operation, even though the employees normally working in those buildings were not engaged in duties essential to the safety or security of the public. In the *Ship Repair (Esquimalt) Case* (1977) PSSRB file 181–2–65, the bargaining agent agreed to the designation of certain employees engaged in docking and undocking vessels to save the Canadian taxpayer needless expense if a ship were damaged badly enough to be in danger of sinking.

217. Part I, pp. 148–50.

218. In the case of the communications and electronics bargaining units, the parties agreed ([1971] PSSRB file 181–2–12, [1971] PSSRB file 182–2–16; and [1973] PSSRB file 182–2–27) that if the Minister of National Defence or the Secretary of State for External Affairs, declared that an emergency existed, all employees in the bargaining unit would be considered designated for the duration of the emergency. In the *Clerical and Regulatory Case* (1980) PSSRB file 181–2–114, the parties agreed that where the Secretary of State and/or the Head of Post declared that an emergency existed, all employees in the Department of External Affairs who are necessary for the performance of duties required in relation to the emergency are to be deemed designated. In the *Primary Products Case* (1975) PSSRB file 181–2–31, employees in

the Contagious Division of the Department of Agriculture were to be recalled in the event of an outbreak of a contagious disease. So also were nurses in the *Nursing Case* (1976) PSSRB file 181–2–71, in the event of a major disaster or major outbreak of disease. In the *Veterinary Science Case* (1976) PSSRB file 181–2–49, the parties agreed on the designation of a specified list of employees

> ...to perform the full scope of their duties, where an emergency is declared by the Regional Veterinarian, an emergency being defined as follows: where there is any incidence of a transmittable disease, which may have been transmitted to humans and/or where a regional supervisor reports to a Regional Vet. that he is unable to handle on his own a reported outbreak of any named contagious disease.

In the *Ships' Crews Case* (1978) PSSRB file 181–2–74, the parties agreed to the designation on a 'contingency basis' of certain employees to perform their duties when called upon by the Dominion Hydrographer to conduct emergency hydrographic survey work to ensure the safety of existing shipping lanes and to take action in emergencies encompassing "accidents or incidents such as groundings, sinkings or Acts of God which create serious navigational hazards."

In some cases an agreement on designation in emergency situations provides that the PSSRB is to be notified immediately of the nature of the emergency when employees are called upon to report. See, for example, the *Nurses Case* (1977) PSSRB file 181–2–71.

219. See pp. 507–10, below.

220. (1969) PSSR Reports K 394.

221. *Ibid.*, at K 409–K 410. Emphasis added. In an earlier case, the *Air Traffic Control Case* (1968) PSSRB file 181–2–3, the employer had undertaken that in the event of a strike, it would suspend all IFR (instrument-flight rules) traffic-control services, relied on chiefly by commercial airlines, and that VFR (visual-flight rules) traffic-control services would have to be provided by designated air-traffic controllers only to render assistance to aircraft involved in emergency or hazardous situations. This undertaking, together with the consideration implicit in the legislation that the primary responsibility for determining what employees are, or will be, engaged in essential duties rests with the parties, no doubt contributed to the suggestion of the PSSRB in the *Electronics Designated Employees Case No. 1* (note 220, above), about the effect of agreement of the parties on the attachment of conditions to designations. Such an undertaking would, of course, make it necessary for the employer to notify users of air-traffic-control services that certain services would not be available to them. As a consequence, the opportunity of commercial airlines to make use

of airports in Canada would be limited or even non-existent. The undertaking referred to above had also been given by the employer and concurred in by the bargaining agent in a number of subsequent rounds of bargaining with employees in the air-traffic-control bargaining unit. (See [1969] PSSRB file 181−2−9; [1972] PSSRB file 181−2−17; and [1974] PSSRB file 181−2−29.) A similar course has been followed for designation of employees in a number of other bargaining units. Thus, in proceedings involving the radio-operations bargaining unit and the communications bargaining unit, the parties agreed that 'commercial correspondence' (that is, business communications between the captain of a vessel and its owner or agent) and 'Department of Transport administrative traffic' would be prohibited (1971) PSSRB file 181−2−11; (1971) PSSRB file 181−2−12; (1975) PSSRB file 181−2−36; and (1975) PSSRB file 181−2−39. In the *Electronics Case*, by agreement, designated employees were required to perform safety checks and emergency maintenance on certain equipment, but the circuits were not to be used for commercial correspondence (1971) PSSRB file 181−2−16. In the *Meteorology Case*, the parties agreed that all Canadian Forces' weather-service meteorologists, including those designated, would be directed to refrain from participating in civilian radio and television broadcasts (1978) PSSRB file 181−2−80. In a *Communications Case*, designated employees in the Department of National Defence and the Department of External Affairs were to operate on 'minimized' conditions and, if an emergency was declared, the originators of messages were to be so informed (1975) PSSRB file 181−2−36. See now, however, the position taken by the employer in the *Air Traffic Control Case* (see below, pp. 507−10), the decision of the Federal Court of Appeal and that of the Supreme Court of Canada with regard to it, and the position taken by the employer in the *Electronics Case*, discussed below, note 281.

222. Thus, in the *Electronics Designated Employees Case No. 1* (see note 220, above), the parties agreed that in the event of a strike, the duties of designated employees in the field offices established to enforce and administer the "Radio Regulations" would be "restricted to those involving the investigation and elimination of radio interference which affects essential transmission of emergency messages in support of police, ambulance, fire-fighting and similar activities" (at K 399). In an *Electronics Case*, (1971) PSSRB file 181−2−16, a number of designated electronics technicians were required to service air-traffic-control communications equipment, but their duties were limited to safety checks and emergency maintenance. In the same case it was agreed that designated technicians would perform maintenance work on aircraft used for essential purposes, such as aircraft-accident

investigations. In a *Meteorology Case* (1975) PSSRB file 181–2–40, designated meteorologists in major forecast offices were not required to make routine forecasts, but they were required to make forecasts in support of mercy or emergency flights, in case of forest fires, and in order to issue weather warnings. In an *Aircraft Operations Case* (1975) PSSRB file 181–2–42, helicopter service by designated pilots was to be available in search-and-rescue operations and emergency evacuation, as well as for emergency services essential to the safe operation of marine navigational aids, emergency situations such as oil spills and vessels in difficulty, and in the investigation of catastrophic accidents or major incidents. In the *Northern Canada Power Commission Case* (1974) PSSRB file 181–10–33, the parties agreed that all employees in the operational category bargaining unit would be designated on a full-time or stand-by basis. However, stand-bys were to be made available only when required to perform emergency repair and maintenance work on equipment essential to the continued provision of services. It was also agreed that diesel plants in Whitehorse and Yellowknife were not to be operated unless a breakdown, malfunction or failure of equipment necessitated the shut-down of hydro facilities. See also note 218, above.

The foregoing is not to be taken as an exhaustive list of situations in which the parties agreed to the limitation of duties of designated employees, but to provide some illustrations of circumstances where such limitations had been agreed to.

223. For an example of conditions that were made applicable to alternate designated employees and stand-by designated employees, see the *Nurses Case* (1977) PSSRB file 181–2–71.

224. Compare, for example, the agreements in *Electronics Cases* (1971) PSSRB file 181–2–16 and (1974) PSSRB file 181–2–27.

225. The evidence placed before the PSSRB in cases of this nature was sometimes fragmentary. In the *Electronics Designated Employees Case No. 1* (see note 220, above) at K 410, the Board commented that:

> ...evidence presented by the Employer was directed primarily to show the services that each branch or division of the Department of Transport offered to the public and was not related in any significant fashion, except in the most general terms, to the particular items of equipment that would be required to make it possible for the Department to render the services that it deemed it would be necessary to continue to render in the event of a strike. Such a state of affairs makes the task of the Board, difficult as it would be even in the best circumstances, all the more difficult.

In the *Veterinary Science Case* (1976) PSSRB file 181−2−49, the PSSRB pointed out that:

> While it is not our intention to fault the parties, the fact is that the evidence and submissions presented to us [have] provided no more than the most rudimentary guidance or assistance in deciding what services, and what employees in the Meat Inspection Division providing those services, would be required in the interests of the safety or security of the public in the event that members of the Veterinary Science Group should engage in lawful strike action.

226. See p. 489, above.

227. (1976) PSSRB file 181−2−49.

228. *Attorney General of Canada* v. *Public Service Staff Relations Board* (1977) 1 F.C. 56 at 61 and 62.

229. The provisions of the New Brunswick Public Service Labour Relations Act, R.S.N.B. 1973, c. P−25, concerning the *procedure* for determining the employees or classes of employees to be designated are the same as in the federal legislation (s. 50). At an early stage, the then Chairman of the New Brunswick Board, Mr. S. Dodd Tweedie, suggested, as a 'rule-of-thumb', that fifty per cent of those employees be designated as employees whose duties were necessary in the interest of public health as called for under the New Brunswick legislation. Mr. Tweedie expressed the view that the designation of any larger percentage would make a strike by the remaining employees meaningless and ineffective. The 'percentage' concept no longer finds favour with the New Brunswick Board as presently constituted. However, the officers of the Board hold that "the document did achieve its objective in that the Employer did make the effort to considerably reduce the deemed list of designated employees" (letter from R.A. Watling, Senior Executive Officer of the New Brunswick Board, 11 September 1976).

230. (1972) PSSR Reports K 900.

231. See PSSR Reports C−1067.

232. (1978) PSSRB file 181−S−2−1. For a discussion of the Board's decision in this case and of the events that followed that decision, see below, pp. 503−7.

233. (1979) PSSRB file 181−2−99.

234. (1976) PSSRB file 181−2−47.

235. (1977) PSSRB file 181−2−67.

236. (1979) PSSRB file 181−2−99.

237. In the *Electronics Designated Employees Case No. 1* (1969) PSSR Reports K 394 at K 401−K 402, the PSSRB said:

> The Act does not contemplate that public convenience should remain unaffected [during the course of a lawful strike]. 'Public convenience and necessity' is a well-known legislative term, but it does not appear in the Public Service Staff Relations Act. The Act does not draw the line at 'convenience of the public' but at 'safety and security of the public'."

The problem of distinguishing between 'safety and security', on the one hand, and 'convenience', on the other, is well illustrated in the Board's decision in the *Radio Operations Case*, above.

238. *Ibid.* at K 400–K 401. Compare the view expressed by S. Dodd Tweedie, Chairman of the New Brunswick Public Service Labour Relations Board, referred to in note 229, above.

239. *Ibid.* at K 399. See also *Veterinary Science Case* (note 227, above), and *Radio Operations Case* (1979) PSSRB file 181–2–99, where the Board, differently constituted, said that it did not quarrel with this dictum. See also the comment in the *Supplementary Observations and Recommendations* submitted to the Special Joint Committee of the Senate and the House of Commons on Employer-Employee Relations in the Public Service of Canada which considered the *Finkelman Report* (p. A–6):

> In reaching any determination on designated employees, we cannot erase from our minds the thought that, if anything untoward should happen because we have not designated a certain employee, we will have to answer to our consciences, if not to the public, for the rest of our lives.

An excellent illustration of the process of reasoning whereby the PSSRB arrives at a conclusion on a particular proposal of the employer is to be found in the Board's decision in the *Radio Operations Case* (above). In that case the Board was called on to consider the functions that various groups of employees performed normally, the purpose of those functions, the probable impact on public safety or security if the services were discontinued, and the options that might be available to the employer to ensure public safety and security if the employees' services were withdrawn.

240. *Radio Operations Case*, note 239, above.

241. See note 237 above, at K 403–K 404.

242. *Ibid.* at K 402.

243. See note 239 above.

244. See note 237, above.

245. *Ibid.*, at K 405.

246. *Ibid.*, at K 411–K 413.

247. *Ibid.*, at K 414–K 415.

248. *Ibid.*

249. (1972) PSSR Reports K 839.

250. See note 237, above.

251. (1972) PSSR Reports K 854 at K 861. The recorders record all incoming calls to air-traffic control from an aircraft, as well as all outgoing calls from air-traffic-control personnel in the tower, terminal-control and area-control centres. The tape recorder itself has no direct bearing on the safety of an aircraft at the point of time when an emergency arises. When alleged losses of separation standards or near misses are reported by pilots, a fact-finding board is established to investigate and determine the possible causes. The tape recorder is one of the important elements on which such a board has to base its findings and its eventual conclusions and recommendations.

252. (1970) PSSRB file 181–2–10.

253. *Ships Crews Designated Employees Case* (1970) PSSR Reports K 585. However, the Board recommended that the parties meet and discuss what measures might be taken to ensure the safety and security of the property concerned, in the event of a strike, and commented that this is a course frequently adopted in the private sector.

254. (1972) PSSR Reports K 900. See especially K 902 ff. and K 908–K 909.

255. It should be borne in mind that the bargaining agents who might represent employees working in these buildings were not represented at the hearing in this case.

256. In the *Aircraft Operations Case* (1975) PSSRB file 181–2–42, the parties agreed that VIP flights would be maintained in a security-of-state operation, particularly for emergency transportation of Cabinet Ministers.

257. The PSSRB remarked that although the functions performed in some of these buildings were not required for the safety or security of the public, serious damage might be done to their valuable contents if temperature and humidity were not maintained at proper levels. It suggested that the parties confer and reach an understanding on ways and means to ensure conservation of important assets. The Special Joint Committee on the *Finkelman Report* recommended (*Sixth Report*, 47:14) that employees be designated to ensure the continuation of long-term experiments and to maintain the necessary physical environment for the security of national treasures. It also recommended that provision be made in the designation process to ensure that the temperature in all public buildings does not fall below 5° Celsius.

258. (1974) PSSRB file 181–2–28. In the *Printing Operations Case* (1978) PSSRB file 181–2–86, the parties agreed to designate

employees in the printing-operations bargaining unit, who were essential to the operations of Parliament, with the proviso that if the work-load was not sufficient for all designated employees, some would be advised not to report. Employees in this unit in the Department of Justice were designated to print court cases, copies of evidence, and information bulletins on policy statements and changes in law. In the *Printing Operations Case* (1979) PSSRB file 181−2−106, the agreement on designation spells out in detail the types of parliamentary and related documents that are to be produced by designated employees, and a condition is added that no more of such documents are to be produced than are required to supply the needs of Parliament.

259. (1976) PSSRB file 181−2−47.

260. For example, the employer's list included "Foodstuffs of any type".

261. The PSSRB was informed that the employer did not propose the designation of officers at ports of entry where oil is imported by means of a pipeline. The functions of customs officers in relation to such importation is in the nature of paperwork that is done after the oil has passed through the pipeline.

262. (1976) PSSRB file 181−2−49. For another aspect of the *Veterinary Science Case*, see above, pp. 492−93.

263. (1978) PSSRB file 181−S−2−1.

264. The Board concluded that the criteria for entitlement to payments derived from the War Veterans Allowance/Civilian War Allowance would be a useful guide to the annual income which could be considered a minimum to ensure that the safety or security of a person would not be adversely affected and fixed the threshold (as it was at that time) at $6025 for a married person and $3520 for a single person.

265. The PSSRB stated that payments due under the Returned Soldiers and Veterans Insurance and the Canada Manpower Training Programs were not necessary for the safety or security of the public. They made the same statement concerning the recipients of payments under the Old Age Security program who were not in receipt of a Guaranteed Income Supplement.

266. Following the release of the Board's decision, the employer took the position that it was unable to prepare a list of designated employees that would comply with the formula set out in the decision. See also note 270, below. However, the matter did not come to a head because of the successful conclusion of the negotiations for new collective agreements.

267. (1980) PSSRB file 181−2−116.

268. He relied on a statement of the PSSRB in the *Radio Operations Case* (1979) PSSRB file 181−2−99, that "to encompass . . . within the

words 'safety or security' the mental, psychological or emotional state of individuals strains the ordinary meaning of those words."

269. For the Board's reason, see p. 504, above.

270. The Board said that the process envisaged in the earlier case, whereby certain persons would be required to file declarations disclosing that their total annual income fell below the threshold level, was impracticable. The evidence before the Board in the *Data Processing Case* (note 267, above) was that a disconcerting number of dependent recipients failed to complete promptly even their annual renewal applications under the several programs.

271. The Board held that it was necessary for the following programs to supply continued income payments to entitled recipients in the event of a strike by members of the data-processing bargaining unit: Indian Welfare Program, Canada Pension Plan, Canada Pension Commission, Old Age Security/Guaranteed Income Supplement, War Veterans Allowance/Civilian War Allowance, Public Service Superannuation, Royal Canadian Mounted Police Superannuation, Canadian Forces Superannuation, Members of Parliament Retiring Allowance, Family Allowances, Indian Allowances for Foster Children, and Unemployment Insurance. The Board also held that the following programs were not required to supply continued income payments: Canadian Government Annuities, Indian Eskimo Tuition, and Canada Manpower Training. The nature of each of the programs, the number of dependent recipients, and the acuteness of their need were set out at length in the decision.

272. (1974) PSSRB file 181−2−32.

273. See note 267, above.

274. (1980) PSSRB file 181−2−134.

275. See notes 209 and 210, above.

276. See note 221, above.

277. See above, p. 491.

278. Pursuant to the Aeronautics Act, R.S.C. 1970, c. A−3.

279. *Re The Queen in Right of Canada and Canadian Air Traffic Control Association No. 2* (1982) 128 D.L.R. (3d) 685 at 689 and 693.

280. (1982) 1 S.C.R. 696.

281. Indeed, in an electronics case that came before the Board after the Air Traffic Control decisions, the employer proposed the designation of a great many more persons than had been proposed in previous rounds of bargaining, and no list of conditions was attached to the proposal; both these circumstances represented departures from earlier cases.

282. *Proceedings*, 1966, p. 1024.

283. (1979) PSSRB file 181–2–99.

284. This position was affirmed in the *Data Processing Case* (1980) PSSRB file 181–2–116 and in the *Nurses Case* (1980) PSSRB file 181–2–115.

285. Such committees have usually been established, and their efforts to resolve difficulties have generally been effective.

286. In most cases, the employer has then substituted the names of employees not so charged. In the *Electronics Application for Consent to Institute Prosecution Case No. 1* (1972) PSSR Reports K 923, the employer sought leave to prosecute a number of employees who, it claimed, were designated employees, but had participated in a lawful strike by their fellow employees. They had been notified by the employer that they were being designated as replacements for certain designated employees, but the employer had failed to observe the notification procedure provided for in the PSSRA. The Board said that these employees were not on strike illegally and denied consent to prosecute (at K 934).

287. See, in this connection, *Electronics Case No. 2* (1969) PSSR Reports K 341. In this case the PSSRB excluded from the electronics bargaining unit certain employees in the electronics occupational group identified by position number in an order in council under s. 112 (quoted in Chapter 4, pp. 153–54, above). This document directed that "in the interest of the safety and security of Canada and states allied or associated with Canada the Treasury Board shall not negotiate with or enter into a collective agreement with any bargaining agent in respect of any of" the persons from time to time holding certain numbered positions. The list of such persons has been updated on four occasions. Although the employees holding these positions have not been designated under section 79 of the PSSRA, they are prohibited from striking by reason of paragraph 101(1)(*a*) which declares that "No employee shall participate in a strike . . . who is not included in a bargaining unit for which a bargaining agent has been certified by the Board."

288. (1983) PSSRB file 181–2–156.

289. See p. 475, above.

11: Resolution of 'Rights' Disputes

The Right to Present a Grievance

Ever since 1943, labour-relations legislation in Canada has contained express provisions for the resolution of disputes that arise during the term of a collective agreement and that concern its interpretation or application.[1] The Public Service Staff Relations Act (PSSRA) incorporates appropriate provisions to deal both with collective agreements and with arbitral awards. As a first step, the Act provides in subsection 90(1):

> Where any employee feels himself to be aggrieved
>
> (*a*) by the interpretation or application in respect of him of
>
> (i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or
>
> (ii) a provision of a collective agreement or an arbitral award; or
>
> (*b*) as a result of any occurrence or matter affecting his terms and conditions of employment, other than a provision described in subparagraph (*a*) (i) or (ii),
>
> in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, he is entitled[2] . . . to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

It is evident that employees are entitled to present grievances on matters that go far beyond those arising out of the interpretation or application of a collective agreement or an arbitral award. In addition, given the definition of the term 'grievance' in section 2 of the PSSRA, the right to present a grievance is extended to persons employed in a managerial or confidential capacity.[3]

The definition of the term 'grievance' further declares that:

> ...for the purposes of any of the provisions of this Act respecting grievances with respect to disciplinary action resulting in discharge or suspension, a reference to an "employee" includes a former employee or a person who would be a former employee but for the fact that at the time of his discharge or suspension he was a person employed in a managerial or confidential capacity.[4]

For some years adjudicators interpreting the provisions of the PSSRA concerning grievances took the position that a former employee could not grieve about any matter other than disciplinary action resulting in discharge, suspension or a financial penalty.[5]

E.B. Jolliffe, Deputy Chairman of the Public Service Staff Relations Board (PSSRB), expressed the view in *Clark*, in 1972[6] that this conclusion about the right of a former employee to process a grievance to adjudication might have deplorable results; indeed, he invited an application to the courts in the hope that he might be corrected. However, the invitation was not accepted until the decision of the Board in *Lavoie*,[7] in 1979, led to a reference to the Federal Court of Appeal.[8] The question that came before the Board, and the sole question before the Court, was whether the Board had jurisdiction to grant an extension of time for the presentation of a grievance when the employer contended that the person seeking the extension was not an employee at the time the extension was sought since he had previously been rejected on probation. Jackett C.J. held as follows:[9]

> Here the applicant wishes to grieve against "dismissal". Even though that grievance is based on a purported "rejection", it may turn out on an examination of the facts that it is a grievance with respect to disciplinary action resulting in discharge.[10] The Board would, therefore, have jurisdiction to extend time for such a grievance without first deciding whether the grievance would succeed.

Although, up to this point in his decision, the Chief Justice was dealing with a situation where the grievance might conceivably bring the application within the disciplinary aspect of the

Board's jurisdiction, he went on to make the following comments (with the reservation that he was not expressing any concluded view on the question):

> In my view, the introductory words of section 90(1) of the *Public Service Staff Relations Act* must be read as including any *person* who feels himself aggrieved as an "employee". Otherwise a person who, while an "employee" had a grievance — e.g., in respect of classification or salary — would be deprived of the right to grieve by a termination of employment — e.g., by a lay-off. It would take very clear words to convince me that this result could have been intended.[11]

Shortly afterwards the Court was called upon, in *Gloin et al.* v. *Attorney General of Canada and the Public Service Staff Relations Board*,[12] to deal with a case in which 'former employees' sought adjudication of a grievance that raised the issue of whether a particular provision of a collective agreement applied to them. In his decision in this case,[13] Urie J. said that the decision in *Lavoie* could not be limited to a situation where an employee is seeking to show that his rejection was really a disciplinary discharge; indeed, that decision applied equally to an employee who grieved on any of the grounds set out in subsection 90(1) of the PSSRA.

Procedure for Presenting a Grievance

Most labour-relations statutes in Canada leave negotiating parties to establish the appropriate grievance procedure in the course of their negotiations.[14] Subsection 99(1) of the PSSRA, on the other hand, empowers the PSSRB to:

> ...make regulations[15] in relation to the procedure for the presenting of grievances, including regulations respecting
> (*a*) the manner and form of presenting a grievance;
> (*b*) the maximum number of levels of officers of the employer to whom grievances may be presented;[16]
> (*c*) the time within which a grievance may be presented up to any level in the grievance process including the final level;
> (*d*) the circumstances in which any level below the final level in the grievance process may be eliminated; and
> (*e*) in any case of doubt, the circumstances in which any occurrence or matter may be said to constitute a grievance.

However, the right of negotiating parties to devise a grievance procedure suited to their special needs and circumstances has been recognized, since the PSSRA further provides, in subsection 99(2), that:

> Any regulations made by the [PSSRB] ... in relation to the procedure for the presentation of grievances shall not apply in respect of employees included in a bargaining unit for which a bargaining agent has been certified by the Board, to the extent that such regulations are inconsistent with any provisions contained in a collective agreement entered into by the bargaining agent and the employer applicable to those employees.

Although, as we have already pointed out, this provision was introduced to preserve the parties' freedom to design a grievance procedure best suited to their needs, the employer and bargaining agents have not always used it wisely. In *Dunaenko*[17] the Chief Adjudicator, after pointing out that most of the language relating to grievance procedure in the collective agreement under consideration in that case resembled or paraphrased language in the PSSRA and the *Regulations* of the PSSRB, went on to say:[18]

> However, there are some significant variations which tend to confuse rather than clarify rights granted to employees by law.
>
> I am at a loss to know what is gained by reproducing in garbled form within the framework of a collective agreement provisions which already appear in the statute or in regulations made under the statute. It may have been thought that [the article in the agreement], being readily accessible to employees, would be a helpful source of information or education with respect to the exercise of their rights. The unfortunate reality is that misinformation or inadequate information can be even less helpful than no information at all ...; it is not the function of a collective agreement to provide "information" about matters which have already been defined carefully in more precise language elsewhere.

Shortly after the PSSRA came into force, the PSSRB made regulations[19] requiring the employer, that is, the Treasury Board and the separate employers, to establish a grievance process for each department or portion of the federal public service; until the employer had established such a process, the Board reserved to itself authority, on application of an aggrieved employee, to direct the manner and procedure by which a grievance was to be processed. Under the *Regulations*, the grievance process is to consist of not more than four levels; notices are to be posted in conspicuous places to inform employees about the applicable grievance process. A grievance relating to classification[20] or to disciplinary action resulting in discharge is to be presented at the final level; that is, it is to by-pass the intermediate levels. Other grievances are to be presented at the first level.

A grievance is to be presented to an employee's immediate supervisor or local officer-in-charge, who is required to forward it to the authorized representative of the employer at the appropriate level.[21] On 12 May 1966, the Treasury Board issued "Guidelines for the Establishment of Grievance Procedures in the Public Service" in anticipation of the enactment of the PSSRA. One paragraph read as follows:

> An employee should not be granted the right to present his grievance at the first step of the grievance process unless and until he has attempted to resolve it as a "complaint" through discussion with appropriate officers in his own work area. To emphasize the importance of this "pre-grievance step", departments and agencies should specify an officer in each work area who will normally have the final responsibility for dealing with employee complaints, as a step *preliminary* to the first step in the grievance procedure.

Although the restrictions on the right to present a written grievance[22] at the first level of the grievance procedure could not be made mandatory under the PSSRA, as the "Guidelines" proposed, the practice of encouraging employees to attempt to resolve 'complaints' informally has continued. Indeed, some collective agreements expressly provide for such a course to be followed. Thus, for example, an agreement between the National Research Council of Canada and the Research Council Employees Association for the technical category bargaining unit provided that "If an employee wishes to do so, he may discuss a complaint (oral grievance) with his immediate supervisor, Branch Head or Director before presenting a grievance." Whether or not a collective agreement provides for such a step, the immediate supervisor, in some instances, appears to have considerable authority to deal effectively with complaints.

A grievance has to be presented not later than the twentieth day — the twenty-fifth day in the case of a classification grievance — after the employee has knowledge of the action or circumstances that have given it rise. A question of timeliness was raised in *Talbot et al.*[23] Chief Adjudicator Jolliffe pointed out that a distinction must be made between a situation where a grievance arises out of a non-recurring event and one arising where there is a certain obligation under a collective agreement recurring on each and every day; in this case the issue was whether an obligation existed to grant employees a scheduled meal period or, as an alternative, pay for one-half hour. The Chief Adjudicator upheld the timeliness of the grievance only so far as the complaint related to the days on which the meal period was not granted when those days fell within the time limits set by the agreement.

The authorized representative of the employer at each level is required to deliver a reply to the aggrieved employee within fifteen days — sixty days in the case of a classification grievance — after the grievance is presented at that level. There have been instances in which the representative of the employer has 'returned' a grievance to the person who presented it with the notation that he or she has no right of access to the grievance procedure. E.B. Jolliffe, Deputy Chairman of the PSSRB, has frowned on this practice and has set out what he considered to be the correct procedure:[24]

> ...the practice of "returning" a grievance, sometimes used at the Post Office, is wholly improper. The correct course in any termination case is to reply to the grievance at the final level, and in timely fashion (not several months later) as required by the collective agreement and the P.S.S.R.B. Regulations and Rules of Procedure. The [PSSRA] and the Regulations give the Board power to decide the adjudicability of a grievance, subject of course to review by the Federal Court of Appeal. It is never the function of any official in the Department to hold that a grievance is not grievable or adjudicable and should be "returned" on that ground. The official's duty is to *reply* to the grievance affirmatively or negatively and not evade the issue. If the Department considers the grievor has no status, the most it can do is to say so clearly in its final reply and rely on counsel to argue the point if, as and when the grievance comes before the Board under the Public Service Staff Relations Act. There is no authority in that Act or anywhere else enabling any public servant, senior or junior, to decide that a grievance is not receivable. The practice of "returning" grievances for any reason is a sign of ignorance amounting to incompetence and it should cease forthwith.

The employee is entitled to move his grievance to a higher level not later than ten days after he has received a reply. If a reply is not delivered within the stated time limit, the employee is entitled to move his grievance to a higher level fifteen days after the last day when a reply should have been delivered to him. If the employee fails to act within the stated time limits, he will be considered to have abandoned the grievance.[25] However, the

Regulations in subsection 74(3) provide that such a consequence may not follow in certain specified circumstances:

> Where, in the opinion of the [PSSRB], an employee who feels himself to be aggrieved is so stationed, positioned or located that he is unable to deliver a grievance, or cause it to be delivered . . . within the prescribed time . . . , the Board may, either before or after the expiration of the prescribed time, authorize the presentation of the grievance in such manner and within such time as it deems appropriate.

In addition, the *Regulations* declare[26] that:

> Notwithstanding anything in this Part [which deals with the grievance process and adjudication procedure], the times prescribed by this Part or provided for in a grievance procedure contained in a collective agreement for the doing of any act, the presentation of any grievance at any level or the serving or filing of any notice, reply or document may be extended either before or after the expiration of those times
> (*a*) by agreement of the parties; or
> (*b*) by the [PSSRB], on the application of an employer, an employee or a bargaining agent, on such terms or conditions as the Board thinks fit.

Concerning the circumstances in which an extension of time should be granted, Deputy Chairman Kates said in *Gourlie*:[27]

> ...the onus rests upon a grievor to come forward with a reasonable explanation of any extenuating circumstances for the delay.
>
> . . .
>
> Let me say for present purposes that I am generally of the view that a party who feels prejudiced by the actions of the employer must at all times act with expedition and due diligence in forwarding any claim that he may have as a result of the impugned actions taken against him.

In *Dunham*,[28] Mr. Kates said that the Board

> ...may determine the existence of any prejudice that would be caused to the employer party should it be . . . disposed to grant the application 'on such terms or conditions' that might reduce or eliminate that prejudice. . . . If any prejudice that emerges can be reduced then the Board may be disposed, even in the absence of a poor excuse for delay, to extend the time limits for the purpose of the presentation of a grievance.

A question has arisen in a number of cases in which an application has been made for an extension of time, whether an applicant should be held responsible for the faults of his advisors. In *Dunaenko*,[29] Chief Adjudicator E.B. Jolliffe said:

> I cannot accept the argument that the ignorance or negligence of the applicant's union or his Bargaining Agent must be accepted by Mr. Dunaenko as his own. It would be highly artificial and inappropriate to introduce into these circumstances that large body of law relating to agency and vicarious liability which has grown up in an entirely different context, chiefly in the area of commercial contracts and also responsibility for damages in tort.[30]
>
> It is true that, for collective bargaining purposes, the Bargaining Agent is legally designated under the [PSSRA] as the employee's representative and agent. To that extent the relationship of principal and agent does arise. . . . [H]owever, employees have certain statutory rights to grieve and go to adjudication entirely separate and apart from collective bargaining, . . . I am not prepared to deny access to such statutory rights by reason of defection or inadequate representation on the part of the Bargaining Agent.[31]

On the other hand, in *Gourlie*,[32] Deputy Chairman Kates said:

> ...a party in seeking recourse must accept some responsibility for the type and quality of advice he receives be it at the instance of a bargaining agent or indeed legal counsel. In short, generally a party retains counsel and secures advice at his own peril and must look to other forums for the bad or negligent advice he may have received.

The vast majority of collective agreements now contain provisions for processing grievances,[33] and the PSSRB's *Regulations*, in the main, do not apply.[34] However, the *Regulations* are applicable to grievances in those instances where a collective agreement does not contain such provisions[35] and to employees who are not included in a bargaining unit for which a bargaining agent has been certified, as well as to persons employed in a managerial or confidential capacity.

Adjudicability of Grievance

If an employee fails to have his grievance resolved to his satisfaction, he may, in some instances, *but not in all*, carry his grievance a step further. Subsection 91(1) of the PSSRA provides that:

> Where an employee has presented a grievance up to and including the final level[36] in the grievance process with respect to
>
> (*a*) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award,[37] or

> (*b*) disciplinary action resulting in discharge, suspension or a financial penalty,
>
> and his grievance has not been dealt with to his satisfaction, he may refer the grievance to adjudication.[38]

As we have seen,[39] where notice to bargain has been given in accordance with the PSSRA, section 51 provides that any term or condition of employment applicable to employees in the bargaining unit remain in force until a new collective agreement has been entered into, or a new arbitral award has been issued with respect to the bargaining unit, or seven days have elapsed after a conciliation board has reported, or the request for the establishment of a conciliation board has been denied, whichever circumstance applies. The question has arisen whether grievances may be presented during what is sometimes referred to as the 'freeze period', and whether they may be referred to adjudication. As we have already noted, section 90 of the Act confers on employees a statutory right, not dependent on the existence of a collective agreement, to present a grievance on any matter which affects an employee's terms and conditions of employment and for which no administrative procedure for redress is provided in or under an Act of Parliament. Grievances respecting terms and conditions of employment that may have been established under an expired collective agreement or arbitral award are therefore grievable. To what extent, if at all, can they be referred to adjudication?[40] In *Pyper et al.*, Adjudicator J.F.W. Weatherill said[41] that one of the terms or conditions of employment applicable to employees in a bargaining unit during the period fixed by section 51 of the Act was the right

> ...to file grievances and to proceed to have such grievances determined by adjudication, if need be. The right to arbitration is often regarded as a *quid pro quo* for the prohibition of the strike or lock-out and it may be observed that the employees in this bargaining unit would have been prohibited from going on strike at any time material to this case by virtue of s-s. 101(2) of the Public Service Staff Relations Act.

The events that gave rise to the grievance in *Pyper* occurred before the expiry of the collective agreement. In *Smith*,[42] Adjudicator P. Meyer carried the principle of *Pyper* a step further. He held that "where the violation complained of has occurred during the section 51 period, that violation is on all fours with a violation which occurred prior to the expiry date of the collective agreement provision of the agreement embodying a term or condition of employment." The effect of this decision is that, where a grievance is presented before the expiry of the 'freeze period', it may afterwards be carried to adjudication, even though the reference to adjudication is made after the expiry of that period. However, it has been held that if the grievance is first *presented* after the expiry of the freeze period,[43] or if the events giving rise to the grievance have occurred after the freeze period,[44] the grievance is not referable to adjudication.

A peripheral question about the adjudicability of a grievance arose in *Dumas*[45]. The incumbent bargaining agent had been displaced by a rival organization. An employee in the bargaining unit concerned, with the support of the newly certified bargaining agent, sought to process to adjudication a grievance alleged to have arisen by reason of the employer's non-observance of a term of employment established under the collective agreement between the employer and the previous bargaining agent. Notice to bargain had been served by the newly certified bargaining agent, and section 51 of the PSSRA was therefore applicable to terms and conditions of employment in force at the time. Adjudicator Weatherill held that the grieving employee could not rely on the principles enunciated in the section-51 cases discussed above, since subsections 91(1) and (2) speak of the "provision[s] of a collective agreement", rather than "terms and conditions of employment", which is the language that appears in section 51. He said it was therefore "implicit, and even necessary", in the situation with which he had to deal, "that the collective agreement be a collective agreement in force." Since no collective agreement was in force in the circumstances of the case, the grievance did not concern a provision of a collective agreement within the meaning of section 91 of the Act. He added, "I do not conclude, however, that in other situations (those involving terms and conditions of employment which are indicated in an expired collective agreement but which are maintained in force by virtue of section 51, for example), there will be no right to reference to adjudication. Such a situation is not at issue in the present case." It is submitted that this decision must be confined to the circumstances of the particular case, and that it does not cast doubt on the cases cited above relating to section 51.

The jurisdiction of adjudicators is confined to the types of grievances defined in subsection 91(1) of the PSSRA. Attempts have been made by bargaining agents to expand the scope of adjudication in relation to disciplinary action. In *Salter et al.*,[46] counsel for two aggrieved employees contended that a provision in a collective agreement, which stipulated that 'discipline' should be only for just cause and that 'disciplinary action' (with no qualifying condition) should be subject to adjudication, brought a grievance concerning a 'warning letter' (which involved no financial penalty) within paragraph 91(1)(*a*) rather than 91(1)(*b*) of the PSSRA. The Chief Adjudicator found that the warning letter constituted discipline within the meaning of the term in the collective agreement.[47] However, he said, the intention of Parliament in enacting subsection 91(1) was to exclude from the jurisdiction of adjudicators those forms of disciplinary action that do not result in discharge, suspension or a financial penalty. He then went on to hold that the parties could not, by indirect means, enlarge the jurisdiction of adjudicators by way of provisions that the parties agree between themselves to write into their grievance procedure. What was involved in this case was a matter of substantive rights, not of procedure. In concluding that he lacked jurisdiction to adjudicate on the merits of the grievance, he said:

> In short, regardless of what is said in the agreement, the jurisdiction of adjudicators is, in my opinion, limited to the jurisdiction granted by the Public Service Staff Relations Act. It follows that those provisions in . . . the agreement which purport to create a substantive right to adjudication are of no effect.

Parties to Adjudication

An employee may refer a grievance to adjudication only if he himself has been affected by the circumstances that gave rise to the grievance. However, in *Philby*,[48] Adjudicator R.D. Abbott, said:

> ...it must be recognized that almost any decision of the Employer as to the interpretation or application of a provision of a collective agreement may have an effect on many individual employees throughout the public service. The interpretation or application of a provision of a collective agreement is not necessarily "in respect of" a grievor solely when the name of that grievor was specifically in mind when a decision of the Employer was made concerning the interpretation or application of a provision of a collective agreement. What is required to meet the test under section 91 of the Act is an effect on the Grievor which is sufficiently immediate, direct and personal.

In *Morabito et al.*[49] the aggrieved employee contended that he was entitled to carry to adjudication a grievance complaining that the employer had failed to observe a provision of the collective agreement calling for consultation on a certain matter between the employer and the bargaining agent. The aggrieved employee could not offer any proof that the alleged violation of the agreement had affected him in any way differently from all other employees in the same category, and there was no specific redress that he could claim for himself as far as his own working conditions were concerned. Consequently the adjudicator concluded:

> I have no doubt that the mere fact that the Grievor is a member of the bargaining unit is in itself not sufficient t satisfy the condition imposed by s. 91 of the Public Service Staff Relations Act, namely, that the violation complained of by an individual Grievor must be in *respect of him* in order to permit the Grievor to refer the grievance to adjudication under s. 91.[50]

The term 'grievance' is defined in section 2 of the PSSRA as "a complaint in writing presented in accordance with this Act by an employee *on his own behalf, or on behalf of himself and one or more other employees*".[51] A question has arisen concerning the circumstances in which an employee may refer to adjudication a grievance relating to other employees. The view generally held by adjudicators is that expressed by Chief Adjudicator W.S. Martin in *Levesque et al.*:[52]

> ...if an employee elects to join with other employees in the processing of a grievance, it is necessary that the other employees be specifically identified so that the employer is given the opportunity to assess the factual circumstances surrounding the claims by the other employees, in order to ascertain that the claims by the other employees fall within the confines of the grievance as structured by the grievor signing the grievance.

In this case, five grievances had been referred on behalf of individual letter carriers and other unnamed letter carriers. The Chief Adjudicator held that his disposition of the grievances must be limited to the issues raised by the five named employees.[53] In *Phillips*,[54] E.B. Jolliffe, Chief Adjudicator, took the same position, but he added: "I would not go so far as to say that there are no circumstances whatever in which an employee can grieve on behalf of himself and another employee whose name is not disclosed in the original grievance but such circumstances, if they exist, would be rare indeed." One of the issues in this case was whether a clause in a collective agreement, permitting an employee to grieve, not on his own behalf, but on behalf of other employees, was valid. The Chief Adjudicator held that the clause was valid. Nevertheless, he held that "the Employer was obligated by its agreement to process the grievance presented by Mr. Phillips . . ., *but only with respect to Mr. Phillips himself*. There was no obligation to process it as a so-called group grievance because it failed to identify any other employee alleged to be affected." In *Lasek*[55] the grievance was presented by an employee "'on behalf of myself and any other employee who has been denied by the Employer as I have.'" The adjudicator overruled the objection to the form of the grievance on the ground that "Here there is involved a particular small group of employees, the individual members of which can be named with ease and precision. There are no variables affecting individual cases which would have any material effect."[56]

There seems to be some difference of opinion among adjudicators about whether all the persons involved in a group grievance must sign that grievance. In *Maillé*[57] Adjudicator Perry Meyer raised the question whether the person who did sign the grievance in the case before him had authorization to present a grievance on the group's behalf. He held that there was such authorization in the absence of allegations or proof to the contrary, and this dictum suggests that the lack of authorization is material. In *Harder*[58] the adjudicator held that it was sufficient if the other grievors were expressly named. In *Groves*[59] the adjudicator remarked that the grievance was signed by Groves alone and thus failed to meet "the well known requirements of a group grievance." In *Larade et al.*[60] a group grievance was held to be properly presented when signed by one person, with the others being named in an appendix. In *Dion*,[61] Adjudicator Meyer held that a group grievance was applicable only to the persons who had signed an express authorization to be represented, even though an appendix to the grievance listed a number of other persons. In *Dobson*[62] Adjudicator Abbott held that an objection by the employer to a defect in the form of a group grievance did not relate to a procedural error (which could be waived or acquiesced in by one or other of the parties), but went to jurisdiction.[63] A purported waiver or acquiescence (that is, a failure to raise an objection to the propriety of the grievance before adjudication or at the hearing) did not confer jurisdiction on the adjudicator.

Under the general labour-relations legislation, collective agreements usually provide that grievances may be submitted to arbitration by one of the parties, that is, either the employer or the bargaining agent.[64] However, under the PSSRA, a grievance is 'owned', at all stages, by the employee who presents it.[65] As we have seen, a grievance may be presented by an employee on his own behalf or on behalf of himself and one or more other employees, but it cannot be 'presented' by a bargaining agent.[66] However, in certain circumstances, the Act does provide recourse for a bargaining agent and for the employer. Thus, section 98 declares:

> (1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and
>
> (*a*) the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the collective agreement or arbitral award, and
>
> (*b*) the obligation, if any, is not an obligation the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the collective agreement or arbitral award applies,
>
> either the employer or the bargaining agent may, in the prescribed manner, refer the matter to the [PSSRB],[67] which shall hear and determine whether there is an obligation as alleged and whether, if there is, there has been a failure to observe or to carry out the obligation.[68]
>
> (2) The Board shall hear and determine any matter referred to it pursuant to subsection (1) as though the matter were a grievance. . . .

Concerning the nature of a matter that may be the subject of a reference under section 98 of the PSSRA, Chief Adjudicator E.B. Jolliffe said in *Professional Institute of the Public Service of Canada and the Treasury Board*:[69]

> It should not be overlooked that either a bargaining agent or an employer may initiate a reference under s. 98. In either case, the reference must be based on an obligation arising under an agreement, the obligation must be clear, and it is the responsibility of the party initiating the reference to establish clearly that there has been a failure to observe or carry out that obligation.

The fact that a case may be more conveniently or appropriately heard and determined under section 98 when it is clear that the same dispute would be adjudicable under section 91 at the behest of an individual does not give the PSSRB jurisdiction to deal with the dispute under section 98.[70]

In addition to its right to refer a matter to adjudication under section 98, a bargaining agent has a controlling role in processing grievances and in referring to adjudication grievances concerning the interpretation or application to an employee of a provision of a collective agreement or an arbitral award. Under subsection 90(2), such a grievance may not be presented by the employee unless he has the approval of and is represented by his bargaining agent.[71] The same restriction mentioned above applies, on the basis of subsection 90(2) and section 112 of the PSSRA, to any grievance relating to any action taken on account of "any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada." An employee is entitled to refer to adjudication a grievance relating to the interpretation or application of a collective agreement or arbitral award only if his bargaining agent "signifies in prescribed manner (*a*) its approval of the reference of the grievance to adjudication; and (*b*) its willingness to represent the employee in the adjudication proceedings." No approval of a bargaining agent is required for the presentation of any other type of grievance, but if the aggrieved employee seeks the assistance of an employee organization, he may be represented, according to subsection 90(4) of the PSSRA, only by the organization that was certified as his bargaining agent. This restriction applies also to the reference to adjudication of a grievance relating to disciplinary action resulting in discharge, suspension or a financial penalty. If an employee is not a member of a bargaining unit (and this would include a person employed in a managerial or confidential capacity[72]), subsection 90(3) of the Act permits him to seek the assistance of and, if he chooses, to be represented by, any employee organization.[73]

Adjudicators

Under the PSSRA as originally enacted, the adjudicative function, with certain exceptions that we shall deal with below, was entrusted to adjudicators appointed under section 92 of the Act by the Governor in Council on the recommendation of the PSSRB. The Governor in Council, again on recommendation of the Board, designated one of the adjudicators to be chief adjudicator "to administer, subject to any regulations of the Board, the system of grievance adjudiction established under this Act." By an amendment in 1975, the adjudicators became members of the Board, and the Board was directed to "assign such members as may be required to hear and adjudicate upon grievances referred to adjudication under this Act."[74] When a grievance is referred to adjudication, the Board selects one of its members who is to serve as adjudicator to hear and determine the grievance.[75] An employee may request that a grievance be submitted to a board of adjudication consisting of a member of the PSSRB who is to be the chairman of the board of adjudication and one person nominated by each of the parties. However, section 93 and subsection 94(2) of the Act declare that a grievance may be dealt with by such a board only if the employer makes no objection to the establishment of such a board.[76]

The PSSRA also permits the parties to a collective agreement to name an adjudicator in the agreement for the purposes of the agreement; such a person need not be a member of the PSSRB. Where a 'particular' adjudicator is so named, a grievance under the agreement is to be referred to that person. The agreements between the Treasury Board and the Council of Graphic Arts Unions of the Public Service of Canada for the non-supervisory printing-trade bargaining unit have contained an article governing the negotiation, during the term of an ageement, of wage rates for the operation of new printing equipment not used by an employee at the date of the signing of the agreement. The use of this equipment requires the establishment of new classifications for those who operate and maintain it. If the parties are unable to reach agreement on the proper wage rates, the matter is to be submitted to an individual, who is to give a final decision binding on both parties. The individual so named is a person technically qualified in such matters. There has been no need so far for the parties to resort to this procedure.

A variation of the provision just mentioned is to be found in the collective agreement between the Treasury Board and CUPW, which was effective from 6 December 1975 to 30 June 1977. The agreement provided for adjudication, by a special tripartite adjudication committee, of disputes concerning the introduction by the employer of technological changes. The Postal Services Continuation Act[77] extended the agreement until 21 December 1979, but replaced the special committee with a single adjudicator. There were seven references under the original provision, but all were ultimately withdrawn. There was no reference under the amended provision.

Procedure for Adjudication

Section 96 of the PSSRA contains certain provisions governing the manner in which an adjudicator must perform his functions. He must give both parties, that is, the employer and the employee who presented the grievance and his representative, an opportunity to be heard. In *Rivney*,[78] in connection with a grievance relating to the entitlement of the aggrieved employee to exercise certain seniority rights under a collective agreement, the Chief Adjudicator came to the conclusion that in the special circumstances of the case, "one or more other parties had a real interest in the proceeding and might be prejudiced or affected by the result". When a question of law or jurisdiction concerning the joinder of parties was referred to the PSSRB by the Chief Adjudicator under section 23 (since repealed) of the PSSRA, the Board directed that another employee and his bargaining agent be added as parties to the proceedings before the Chief Adjudicator, and that they be given due notice of hearing and an opportunity to be heard, as well as all the other rights accorded to the original parties.[79]

Under section 87 of the PSSRB's *Regulations and Rules of Procedure*, the Board may dismiss a grievance without an oral hearing on the ground that it is not a grievance that may be referred to adjudication. The section declares that before doing so, the Board may invite — and it almost invariably does invite — the parties to submit written argument; as an alternative, the Board may hold a preliminary hearing. If the Board dismisses the grievance without a hearing, the aggrieved employee may, within a fixed time period, request that the Board review its decision; at this point the Board may revoke its earlier decision and proceed to hear the grievance, or it may hold a 'show-cause' hearing or confirm its earlier decision.

In *Hislop*,[80] E.B. Jolliffe, the Chief Adjudicator, dismissed a reference to adjudication without a hearing, after having invited written representations from the aggrieved employee and his representative. Neither of them made representations about the grievance, but requested "le contact personnel" with the Chief Adjudicator. In his decision, denying the request, the Chief Adjudicator said:[81] "...an interview with only one party present is improper; upon the attendance of the other party, which I would require, it would become in fact a hearing."

With very few exceptions, hearings on adjudication references are held in public. In *McKendry*[82] counsel for both parties requested that the hearing be held *in camera*. In acceding to the request, E.B. Jolliffe, Chief Adjudicator, said:

> During almost six years of the adjudication system and more than 700 references to adjudication, this is the first time the point has arisen. In all cases of which I have knowledge, hearings have been held in public after due notice, as I am sure will continue to be the practice. No departure from that practice could be justified unless there were some paramount consideration making it necessary. . . .
>
> It is not sufficient of course that the parties are in agreement about the matter, significant though that may be. The point must be decided on the basis of principle, not mere convenience or expediency, with due regard for the public interest and the interests of justice and it must be consistent with what has often been said by judges of high authority. . . .
>
> What will be held here . . . is not a trial but a hearing under s. 96 of a reference under s. 91 of the Public Service Staff Relations Act. . . . [An adjudicator] is not bound to proceed with a hearing in exactly the same manner as at a trial in a court of law but clearly [an adjudicator] must not depart from principles established as essential ingredients of the judicial process and, in particular, [an adjudicator] must at all times respect the principles of natural justice. In that context, it is imperative that nothing be done here which might prejudice or impede the administration of justice elsewhere, namely in the courts.
>
> I was informed by both counsel, after Mr. McKendry's reference to adjudication, that more recently he has been charged with an indictable offence under the Criminal Code and that certain of the evidence, not necessarily all the evidence, to be tendered at his trial on that charge may also be tendered here. In the circumstances it would not be in the interests of justice that any of the evidence here receive publicity at this time. . . .
>
> ...I have no power to order that nothing shall be published and I am not making any such order. I think I have power to determine that in the interests of justice the hearing should be held . . . *in camera*.

Under the PSSRA, as it was originally enacted, adjudicators did not have authority to issue summonses to witnesses or to compel the production of documents. At times, adjudicators had no alternative but to accept statements of persons who were not in attendance at the hearing, albeit with a comment that caution must be exercised in giving weight to such statements.[88] Since the enactment of the amendment to the Act in 1975, whereby adjudicators became members of the PSSRB, it has been the practice, in referring a case to a particular member for adjudication, to provide in the instrument of appointment to the member of the Board to whom the grievance is referred, that such "member is hereby assigned the powers, duties and functions of the Board provided by paragraphs 22(*a*), (*b*), (*c*) and (*e*) of the Act. . . ." Summonses to witnesses are usually issued over the signature of the Deputy Chairman, in whom authority to administer the adjudication system has been vested.[84]

When an adjudicator renders a decision, he must send a copy to each party and his or its representative, and to the bargaining agent concerned, and he must deposit a copy with the Secretary of the PSSRB. When a board of adjudication renders a decision, the decision of the majority of the members of the board is the decision of the board, and the decision is to be signed by the chairman.[85] Again, on the basis of subsection 95(2) of the PSSRA, an adjudicator may not render any decision "the effect of which would be to require the amendment of a collective agreement or an arbitral award."[86] Beyond these provisions the Board is given authority to make regulations with respect to adjudication. Although, as we have seen, the Act permits the parties to a collective agreement to establish a grievance procedure inconsistent with any regulations the Board may make for that purpose, the Board's authority to make regulations in relation to the *adjudication* of grievances is paramount. The Act declares in subsection 99(3):

> The Board may make regulations in relation to the adjudication of grievances, including regulations respecting
>
> (*a*) the manner in which and the time within which a grievance may be referred to adjudication after it has been presented up to and including the final level in the grievance process;
>
> (*b*) the manner in which and the time within which boards of adjudication are to be established;
>
> (*c*) the procedure to be followed by adjudicators; and
>
> (*d*) the form of decisions rendered by adjudicators.[87]

The PSSRB's *Regulations*, in sections 79–86, set out procedures to be followed on a reference to adjudication. These include the form of reference; a time limit for referring a grievance to adjudication (that is, twenty days after the employer's reply is received at the final level or after the last day on which the employer was required to reply at the final level); a time limit (five days) for objection to a request for the establishment of a board of adjudication; the requirement of a statement as to whether an aggrieved employee or the employer desires a hearing; and statements of position to be filed by the parties if requested by the Board.

The time limits fixed for the parties are subject to a qualification. Subsection 89(2) of the *Regulations* declares that:

> Where an objection that a grievance was not presented at any level of the grievance procedure within the time limit provided in a collective agreement or prescribed by [the *Regulations*] is raised for the first time after the grievance has been referred to adjudication, such objection shall not be entertained without the express consent of the Board.

Adjudicators have applied the principle of subsection 89(2) from time to time without referring to the subsection. Thus, in *Thompson and Riggs*,[88] a case where the objection to timeliness was not raised during the processing of the grievance, Adjudicator H.W. Arthurs said:

> It is a basic practice in litigious proceedings that when one party seeks to rely upon the procedural errors of another, there is an obligation to so state prior to taking a "fresh step" in the proceedings. Having taken such a fresh step, a party who has failed to object is taken to have waived his right to do so.[89]

In *Smith*,[90] Chief Adjudicator E.B. Jolliffe stated that he preferred to proceed on the 'fresh step' basis, rather than the 'waiver' theory. He also suggested that the objection should be taken at the first level so that it would be open to the employee to seek an extension of time by consent or an application under what was at the time section 55 of the *Regulations* (now section 89[1]).[91] On an application for review of the decision of the Chief Adjudicator, under what was then section 23 of the PSSRA, the PSSRB said[92] that it was not prepared to go as far as the Chief Adjudicator:

> We believe that to do so would seriously weaken the value of a multi-step grievance procedure. . . . The ends of justice would be served by holding that an omission at any level of the grievance procedure to raise an objection as to timeliness should not bar the objection being raised at a later stage unless the aggrieved employee is deprived, because of the omission, of the opportunity to seek other relief against the time limits. . . . The effectiveness of the grievance procedure may be weakened if grievance officers were rigidly held to be bound to raise timeliness objections at the first level on pain of the employer forfeiting any right to raise such an objection at a higher level. The primary purpose of a grievance procedure is to provide an opportunity for eliminating causes for discontent — not to pave the way for a judicial inquiry into their validity. Nothing should be done that will make this purpose more difficult to achieve.[93]

On the form of decision to be rendered by adjudicators, subsection 86(1) of the *Regulations* provides that:

> The decision of an adjudicator or a board of adjudiction shall contain
> (*a*) a summary statement of the grievance;
> (*b*) a summary of the representations of the parties;
> (*c*) the decision on the grievance; and
> (*d*) the reasons for the decision.

Availability of Administrative Procedure for Redress

The exclusion from the scope of the *grievance process*, under subsection 90(1) of the PSSRA, of matters concerning which an administrative procedure for redress is provided in or under an Act of Parliament[94] has not proved in practice to be a major problem in the *processing* of grievances up to the final level. On the whole, as far as the grievance process itself is concerned, it appears that there have been relatively few instances in which the employer or its agents have refused to accept a grievance on the ground that an administrative procedure should have been used other than the one provided for under the PSSRA. However, there are some areas where this exclusion has raised an awkward jurisdictional problem in adjudication.

In the 1975 round of bargaining between CUPW and the employer, the bargaining agent proposed the inclusion in a collective agreement of a definition of the term 'grievance' that would have entitled an employee to present a grievance in a case where the employer was alleged to have acted unjustly or improperly. In the terms of reference to the conciliation board, the Chairman of the PSSRB ruled that the proposal could not be referred, since it sought to establish an entitlement to present grievances in respect of some matters for which another procedure for redress was available under the Public Service Employment Act: promotion, lay-off, and release for incompetence or incapacity.[95]

The *Finkelman Report*[96] recommended that:

> ...(a) the words "in respect of which no administrative procedure for redress is provided in or under an Act of Parliament" be deleted from subsection 90(1) of the [PSSRA], and (b) where the reply of the employer at any level is that there is an administrative procedure for redress available, the grievance should be referred immediately to the final level of the grievance process, *i.e.*,

> bypassing the intermediate steps. If the reply at the final level is to the same effect, the reply should also state what that procedure may be. If the aggrieved employee challenges the validity of the reply, he would be entitled to refer the matter to the [PSSRB] for a ruling on the technical point at issue.

Adjudicators' Rulings on Various Types of 'Disciplinary' Action

Incompetence and Incapacity

The Public Service Employment Act, in section 31, provides that where a deputy head recommends to the Public Service Commission that an employee be released or demoted for incompetence or incapacity, the employee may appeal against the recommendation to an appeal board established by the Commission. The Commission is required to give effect to the decision of the appeal board. Situations may arise in which an employee believes that the real reason the deputy head recommended his release was not incompetence or incapacity, but misconduct. The line between incompetence or incapacity, on the one hand, and misconduct, on the other, is difficult to draw. The employee may be faced with the dilemma of not knowing which is the proper remedy to pursue: to appeal against the recommendation or to file a grievance relating to disciplinary action. Indeed, the grounds for the action taken against the employee may be a mixture of incompetence or incapacity and conduct that may warrant disciplinary action. In such circumstances, the person acting on behalf of the employer may well be in a quandary himself concerning the course he should adopt.

In *Robertson*, the Chief Adjudicator was called upon to define the meaning of the term 'disciplinary action'. He said:[97]

> ...the responsibility for disciplinary standards and penalties has been vested by statute in Treasury Board, not in the Public Service Commission. . . . Treasury Board has sought to meet that responsibility by making the general rules in s. 106 [of the *Terms and Conditions of Employment Regulations* under section 7 of the Financial Administration Act]. . . . Both the Statute and s. 106 expressly refer to *penalties for breaches of discipline or misconduct*. These words embody the concept of fault, that is to say: either wilful wrongdoing or culpable negligence, either of which can have penal consequences. I think the words do *not* include such failings or

> deficiencies as involuntary incompetence or incapacity . . . which clearly lack the element of voluntary malfeasance.
>
> For clarity, I must add that in some circumstances incompetence or incapacity may be due to voluntary malfeasance and have disciplinary consequences. If an employee abstains from making the effort required of him when he is capable of making such an effort, or making a better effort, the resulting "unsatisfactory performance" may well attract attention — and a penalty. In such a case, however, it is the voluntary abstention rather than the poor performance which is culpable and may constitute just cause for disciplinary action.
>
> ...The essential distinction is between that which is voluntary, or within the employee's control, and that which is involuntary, being not within the employee's control or capacity.[98]

For a number of years after the PSSRA came into force, adjudicators held, in the words of the Chief Adjudicator in *Duneanko*,[99] that "'Disciplinary action resulting in discharge, suspension, or a financial penalty' is always grievable and adjudicable — by whatever name it may be called." In other words, adjudicators were inclined to take jurisdiction in connection with any grievance where there was a termination of employment in order to discover whether the termination was, in fact, disciplinary in nature. In 1974 the Federal Court of Appeal, in *Cooper* v. *Treasury Board*,[100] held that adjudicators lacked jurisdiction in a situation where a deputy head recommended release of an employee for incompetence or incapacity. Cooper was informed by his deputy minister that he was recommending to the Commission that Cooper be released from employment because of incapacity. The recommendation was made because Cooper had been harassing another member of the staff by his attentions to her.[101] Cooper appealed against the recommendation to the Appeals Branch of the Commission, but the appeal board upheld the recommendation for his release. About a month later he was notified of the appeal board's decision; he then presented a grievance alleging that his release was, in fact, a disciplinary discharge. The grievance was rejected at the final level of the the grievance process on the ground that the grievance did not fall within the provisions of the PSSRA since another procedure for redress was provided under the Public Service Employment Act. The matter ultimately came before the PSSRB, which held[102] that Cooper was not entitled to seek adjudication of his grievance. The reasons given by the Board for its decision were as follows:

> If the aggrieved employee were permitted to [present a grievance after an unfavourable decision by an appeal board], the Board would, in effect, be allowing him to seek redress before two separate and independent tribunals, neither of which has superior or appellate jurisdiction over the other. It is conceivable that the two tribunals might render conflicting decisions. Such a possible result is obviously highly undesirable; it would invite, indeed perhaps necessitate, interventions by the Federal Court of Appeal to review the matter.
>
> In our view the principle of what might be described as judicial comity — or in this case comity between tribunals — must apply here. . . . The aggrieved employee cannot resort to the adjudication procedure under the Public Service Staff Relations Act so long as the decision of the appeal board established under . . . the Public Service Employment Act stands. If any remedy is open to the aggrieved employee at this point, it can only be by way of a proceeding before the Federal Court of Appeal to have the decision of the appeal board reviewed.

Cooper sought review of the Board's decision before the Federal Court of Appeal, which held as follows:[103]

> When a recommendation is made by a deputy head under section 31(1) [of the Public Service Employment Act], *whatever be the real motives that may have prompted him to make it*, no grievance may be filed with respect to that recommendation under the *Public Service Staff Relations Act* since section 31(3) provides for an appeal from that recommendation to a board which is the sole authority with the power of deciding whether the recommendation is justified. . . . The termination of the employment of the employee in such a case is the automatic result of the decision of the appeal board which the Commission is, by statute, bound to follow. A grievance presented against the release of an employee by the Commission in those circumstances cannot be referred to adjudication since it is not a grievance in respect of a matter covered by section 91(1) [of the PSSRA].[104]

The wide sweep of the Court's decision in the *Cooper Case* had the effect of endowing the large number of personnel officers, representatives of the employer, who may be called upon to deal with the termination of employment of a particular employee, with unfettered discretion to determine the remedy an aggrieved employee may seek and, of course, the choice of tribunal which has jurisdiction to dispose of his 'grievance'. We are not suggesting that the discretion has been abused, but there is always the possibility that it may be abused or may appear to have been abused. One consequence of the decision of the

Federal Court of Appeal in the *Cooper Case* has been that bargaining agents have been loath to support grievances of employees who have been released for the stated reason of incompetence or incapacity, even where there is ground for believing that the prime reason for the termination of employment has been disciplinary action.

The decision of the Federal Court of Appeal in the *Cooper Case* relates to a situation where the employee is appointed to a position the appointment to which lies within the jurisdiction of the Public Service Commission under section 8 of the Public Service Employment Act. Appointment to positions in a number of agencies for which the Treasury Board is the 'employer' and in a number of the separate employers is not subject to the Public Service Employment Act, and there may not be any administrative procedure for redress if an employee of such an agency is released for incompetence or incapacity. Grievances concerning the termination of employment of an employee of such an agency on the assigned ground of incompetence or incapacity, where the employee grieves and alleges that the termination had a disciplinary aspect, are not subject to the limitations on the Board's jurisdiction that were laid down in the *Cooper Case*.[105]

In a number of cases decided before *Cooper*, where the ground given by the employer for termination of employment was disciplinary in nature, adjudicators have held that incompetence or incapacity is a factor to be taken into account in determining whether a discharge was, in fact, disciplinary. Thus, in *Amor*,[106] W.S. Martin, Chief Adjudicator, upheld a discharge because "On the weight of opinion evidence, there can be no doubt that the overwhelming thrust of evidence supports a contention that the grievor did not perform his work in accordance with the reasonable standards prescribed by the Employer." In *Cross*[107] the adjudicator upheld a discharge, stating that "the Employer had every justification for discharging the grievor on the grounds that she was unsuited to perform the functions of a letter carrier." In *Washbrook*,[108] E.B. Jolliffe, Chief Adjudicator, remarked that the real issue was whether the alcoholism of the employee "which led to inevitable impairment of efficiency and vigour constituted misconduct such as to justify disciplinary action. . . ." In *Skulski*,[109] Mr. Jolliffe, commented that discharge because of inability to work as a team member was consistent with his finding that the action of discharge was in reality disciplinary in nature. He concluded that "it was principally the behaviour of the grievor, associated with her attitude and manner in conducting professional relations, which led to a decision that employment must be terminated. In my view, having regard to all the circumstances, the ultimate result is justifiable if properly validated." In *Wright*,[110] Mr. Jolliffe upheld the discharge of an employee because he found that he was unsuited to the special requirements of child-care work.

In *Lalonde*,[111] Adjudicator P. Meyer, after discussing the process relating to incompetence and incapacity under section 31 of the Public Service Employment Act and the process available for disciplinary action under the PSSRA, commented:

> ...there may well be cases in which the Employer has some kind of option between these two alternative methods and it seems to me that in this grey area each case must be looked at on its merits in order to determine which category it falls into.

The decision of the Federal Court of Appeal in the *Cooper Case* now effectively bars an inquiry by an adjudicator into the validity of the termination of employment of an employee if that event is stated by the employer to be a release under section 31 of the Public Service Employment Act. However, the views expressed in *Lalonde* are still relevant to a situation where an employee is notified that he has been discharged for disciplinary reasons, and evidence is adduced at an adjudication hearing relating to the incompetence or incapacity of the employee.

Financial Penalty

It is convenient at this stage to consider the circumstances in which adjudicators have held that disciplinary action may be said to result in a financial penalty, one of the grounds listed in paragraph 91(1)(*b*) of the PSSRA. The withholding of a pay increment that does not infringe any provision of a collective agreement may nevertheless be regarded as a financial penalty if the ground for the deprivation is disciplinary.[112] Transfer of an employee from one position to another, even though the reason for the transfer may be disciplinary in nature, does not *per se* result in a financial penalty if the transfer is to a position where the rate of pay is the same as the employee received previously.[113] The fact that such an employee may not have the opportunity of working as many hours of overtime, or that he may be paid at a lower rate for overtime or suffer a loss of shift premiums in his new position, is not to be regarded as a financial penalty unless a provision in the applicable collective agreement entitles him to these benefits.[114] However, a transfer that caused an employee to lose a bilingual bonus was held to result in a financial penalty, and the grievance was accordingly adjudicable.[115]

In several instances, employees contended that they had been subjected to disciplinary action resulting in a financial penalty where the employer had made a levy upon them to offset losses for which they had been held responsible. In *Retza*[116] Adjudicator K.E. Norman renounced jurisdiction in a situation where there was a shortage in the wicket clerk's surplus cash funds for which the aggrieved employee, a station manager in the Post Office, was held responsible, and no fault was attributed to the employee. The Adjudicator said in part: "It does not follow, in my view, that a request by someone in authority of an employee, be he Wicket Clerk or Postal Station Manager, that he make up a shortage of funds for which he is accountable entails meting-out a financial penalty resulting from disciplinary action." On the other hand, in *Attorney General of Canada* v. *Grégoire*,[117] the Federal Court of Appeal refused to set aside an adjudicator's decision which found that a levy imposed on a postal clerk who accepted a 'fraudulent' cheque in payment of a Post Office money order, without having referred the 'cheque' to a superior officer as required (though no *fault* was attributed to the employee), constituted disciplinary action resulting in a financial penalty. In his decision, Jackett C.J. said:[118]

> One thing is clear. There is no question of the respondent having failed to account for money or other securities that came into his possession. Furthermore, it does not appear that the levy made on the respondent was based on a claim for alleged negligence in the performance of his duties. Indeed, the facts as found by the Adjudicator would seem to make it unlikely that there could be any such claim.
>
> The only conclusion that I can reach in the circumstances is that a pecuniary penalty has, with or without legal foundation, been levied on the respondent for failure to comply with certain of the requirements contained in a "Manual of Financial Procedure".... Furthermore, there is nothing to show that the levy is based on any finding that the "loss" was attributable to the respondent's failure to comply with such requirements.

Subsequently, in *Attorney General of Canada* v. *Brent and Public Service Staff Relations Board and Andrews*,[119] Grant D.J. of the Federal Court, on a motion for prohibition, held that the adjudicator had no jurisdiction to deal with a grievance where the employer sought to recover from an employee compensation for damages caused by his negligence in driving a motor vehicle. The claim was made on the basis of the National Defence Claims Order, 1970, made under section 6 of the Financial Administration Act. The Order provided a procedure for dealing administratively with claims made by the Crown against public servants employed in the Department of National Defence when such claims arose within their employment. The adjudicator had found that the claim of the employer to make a deduction from the employee's salary was a disciplinary action "because it was taken in response to some alleged 'voluntary malfeasance' on the part of the grievor", and that it resulted in a financial penalty. In his decision, Grant D.J. said:[180]

> The error contained in such finding is that it labels the attempts by the Crown to recover as "disciplinary action" simply because the act of the grievor may have amounted to voluntary malfeasance or negligence. In other words attempts by the Crown to recover a debt owing to it by its servant must be considered to be disciplinary action in all cases where the servant has been at fault. Such statement overlooks the fact that it is the action of the Crown which is to be considered in determining as to whether disciplinary action has been taken as opposed to a legitimate proceeding to recover a debt owing. Such reasoning leads to the erroneous proposition that whenever the grievor's action amounts to negligence causing loss to the Crown any action taken by way of recovery is disciplinary within the meaning of [paragraph 91(1)(*b*) of the Act].
>
> For these reasons I find that the only reasonable conclusion that could be drawn by the Adjudicator herein is that there was no element of disciplinary action in the proceedings taken by the Crown against the grievor . . . and that he suffered no financial penalty thereby.

The decision of Grant D.J. was upheld by the Federal Court of Appeal in *Andrews* v. *Brent et al.*,[181] where Thurlow C.J. said:

> As I see it, the case is one in which the Crown has invoked a statutory administrative procedure for the assertion of a civil claim for an amount for which Crown officials consider that an employee, as a result of his negligence, has become liable to the Crown at law. . . . Such an amount when ascertained in accordance with the procedure, in my opinion, is not a penalty. It is in no relevant sense a punishment. It simply is an amount which the Crown claims is owing and which the Crown is about to recover . . . in accordance with statutory regulations which must be regarded as forming part of the conditions on which the employee has been employed.

Thurlow C.J. distinguished the decision in *Attorney-General* v. *Grégoire* and approved a statement of Bora Laskin (now Chief Justice Laskin) speaking for a board of arbitration in *United Electrical, Radio and Machine Workers, Local 524, re Canadian General Electric Co., Ltd.*:[122] "It is important to recognize the difference between discipline involving a sanction which does not represent compensation or recoupment for loss suffered by the Company, and compensatory measures that are designed to offset a loss caused by an employee."

The issue of recoupment for shortages caused by errors in a financial transaction came up again for consideration in *Robb*.[123] On an application for a writ of prohibition against the adjudicator, Mahoney J. of the Trial Division of the Federal Court stated that *Grégoire* was binding upon him and concluded that "recovery from a postal clerk of an amount lost in a financial transaction falls within paragraph 91(1)(*b*) of the *Public Service Staff Relations Act*."[124] The adjudicator then held that *Andrews* was to be distinguished on the facts in the case before him. His reasons were that in *Andrews* steps had been taken by the employer, on the basis of the Financial Administration Act, to recover sums of money owed by the aggrieved employee, and no such steps had been taken in the instant case; moreover "the loss did not result from, nor can it be traced to, any fault of the Grievors in the performance of their duties", whereas there was a finding of negligence in *Andrews*. The adjudicator held on the evidence that the requirement that the employee reimburse the employer was an unwarranted disciplinary action.

Conflict of Interest

It is of special interest in the public service context to establish the circumstances in which an alleged conflict of interest warrants disciplinary action. The leading case on this issue is *McKendry*,[125] where several types of conflict of interest were considered. The aggrieved employee had been discharged for three causes: he had purchased shares in a company that had received a development grant from the government on his recommendation before information concerning the grant was made available to the public; he had received benefits from an officer of the company while the application for the grant was pending; and he had entered into negotiations, during this period, for employment with an associated company. The grievance was dismissed. Concerning the first of these grounds, E.B. Jolliffe, the Chief Adjudicator, said:[126]

> ...even in the absence of statutory provisions, the law has recognized the principle that "public servants must not seek, for private gain, to make use of information not available to the general public to which they have access by reason of their official duties."
>
> In my view, it is not a good defence here to show that certain stock was purchased in good faith without any intent to jeopardize the public interest. Nor is it a good defence to establish that judgment remained unimpaired or that there was no actual bias. This is not a matter of yielding to public suspicion or malicious criticism. The essential requirements are that the public servant should serve only one master and should never place himself in a position where he could be even tempted to prefer his own interests or the interest of another over the interests of the public he is employed to serve. Those requirements constitute the rationale of the doctrine that he should avoid a position of *apparent* bias as well as actual bias, and that he should never place himself in a position where . . . "two interests clash, *or appear to clash*."

The Chief Adjudicator held that the acceptance of benefits places an employee in a position where his judgment could be affected unconsciously, if not consciously, and that the employer need not show that the benefits actually impaired the employee's judgment.[187] Concerning the third ground, the Chief Adjudicator said:[188]

> The real test, in my opinion, is whether the "future employment" discussed is or is likely to be so closely linked to the present functions of the employee that a reasonable man would apprehend a relationship of cause and effect between the two, whether or not the employee is fully conscious of that relationship, and whether or not his performance or judgment is actually impaired. Here I think an onus falls on the employee with a sense of honour to recognize that a conflict of interest may be significant, even though potential rather than actual.

In *Ennis*[189] Deputy Chairman Kates said:

> The Public Servants Conflict of Interest Guidelines make it abundantly clear that not only must an employee be circumspect in the type of outside activities he engages in, particularly where he is liable to secure a financial gain, but he must consciously avoid activities that might appear to compromise his effectiveness as a public servant. Where there may exist the slightest doubt that such extra curricular activities may appear to impair his effectiveness as an employee, the public servant is duty-bound to disclose his outside business interests to his superiors. Obviously, should such disclosure occur, the employer may in the exercise of its judgement direct the employee to divest himself of those interests and thereby

> cease to engage further in the impugned activity. In such circumstances, the employee may elect to resign his position as a public servant so that he may continue to participate in those private business interests. There is absolutely no question that when a public servant engages in outside activities that may be perceived to cast the slightest shadow upon his duties and responsibilities as an employee, a conflict of interest may reasonably be concluded to exist. In such instances, the onus rests upon the public servant to take sufficient and definite corrective action to remove any such conflict.

Nature of Misconduct Warranting Disciplinary Action

It has frequently been argued, without success, in adjudication hearings that no misconduct can be found unless a specific prohibition in writing exists. In *Stewart*, the Chief Adjudicator, after commenting that he was at a loss to understand the theory, went on to say:[130]

> In the Public Service — as in the private sector — there has never been even an attempt to spell out every possible example of what is misconduct as between employer and employee. No such attempt has been made because it cannot be done. "Guide-lines" are often issued in general terms and many common offences (such as smoking in certain areas) have often been identified, but misconduct, whether it be the misconduct of an employer or of an employee, cannot be codified any more than negligence can be formulated and forbidden in a code foreseeing all the contingencies of life. It is quite possible, however, in most cases, for a reasonable man to recognize "misconduct", just as he can usually recognize negligence.

Political Activity

Another area where there is an administrative procedure for redress provided in or under the Public Service Employment Act relates to certain types of prohibited political activity. The Act provides in section 32 that:

> (1) ...except as authorized under this section, no employee, shall
> (*a*) engage in work for, on behalf of or against a candidate for election as a member of the House of Commons, a member of the legislature of a province or a member of the Council of the Yukon Territory or the Northwest Territories, or engage in work for, on behalf of or against a political party; or
> (*b*) be a candidate for election as a member described in paragraph (*a*).

An employee may apply to the Public Service Commission for leave of absence without pay to seek nomination as a candidate or to be a candidate for the offices enumerated above during the election period, or until he ceases to be a candidate. The Commission may grant such leave provided it is of opinion that the applicant's usefulness to the public service in his position would not thereby be impaired. If he is elected, he ceases to be an employee. Any allegation by a complainant that these provisions have not been observed is to be referred to a board established by the Commission to conduct an inquiry. If the board finds that the allegations are substantiated, the Commission may dismiss the employee.

In *Lloyd*[131] an unsuccessful candidate for election to a provincial legislature, who had not been granted leave of absence under the provision of the Public Service Employment Act, was discharged. Adjudicator J.F.W. Weatherill held that in standing for election in the circumstance, the aggrieved employee clearly gave cause for discipline, and a grievance against the discharge was dismissed. In *Brewer*,[132] where leave of absence was also denied, the principle of *Lloyd* was applied, but Deputy Chairman D.H. Kates found that there were extenuating circumstances and substituted suspension for a period of one year for the penalty of discharge. In neither case did the employer take the position that the grievance was not adjudicable, probably because no complaint had been received from any other candidate, and no board of inquiry had been established under the Public Service Employment Act.

The words in section 32 of the Public Service Employment Act relating to political activity other than being a candidate came for consideration in another grievance referred by Brewer[133] a year or so later. During a federal election campaign, the aggrieved employee had addressed to the editors of two newspapers a number of 'open letters' to a candidate for election. The employee was discharged for engaging in prohibited political activity. In his decision Adjudicator S.J. Frankel said:

> ...to be engaged "in work for, on behalf of or against a candidate . . . [or] a political party" is to expend conscious and purposive effort to bring about the election or defeat of a candidate, the success or failure of a political party. Some actions or efforts obviously fall into this category — participating in the planning and organization of political campaigns; soliciting funds for candidates or parties; canvassing the support of voters; speaking at

> public meetings on behalf of candidates or a party. Other actions or efforts may be more difficult to assess in terms of the ends towards which they are directed. . . .

Dr. Frankel expressed the view that off-duty political activities that do not impair a public servant's usefulness as an employee (that is, that do not detrimentally affect the employer's reputation, or render the employee unable properly to discharge his employment obligations or cause other employees to be reluctant to work with him or that do not place an employee in a situation of conflict of interest) must be seen as falling outside the prohibition. He held that although a public servant was not barred from giving expression to concerns and opinions on matters that were very much on the public agenda at the time, the clear object of several of the letters was to discredit a particular candidate; therefore the aggrieved employee engaged in work against a candidate for election and by so doing contravened the prohibitions in the Public Service Employment Act.

A closely related issue, the right of an employee to make critical statements concerning government policies, or the employer's policies or practices, has evoked impassioned argument in hearings before adjudicators where disciplinary action has been taken by the employer. The matter is a delicate one. It has been contended on behalf of aggrieved employees that any restrictions on a public servant in this regard constitute an infringement of the freedom of speech guaranteed under the Canadian Bill of Rights[184] and now under the Charter of Rights in the Constitution Act. In *Stewart*, E.B. Jolliffe, Chief Adjudicator, held that the freedom of speech protected by the Bill of Rights is not an absolute or unqualified right.[185] His views were upheld by the Federal Court of Appeal, where Jackett C.J. said:[186] "In so far as the *Canadian Bill of Rights* protects a citizen's right of free speech, in my view, it is not impaired by a restriction voluntarily accepted by entering on an office or entering into a contract of employment." In *Fraser*,[187] in 1982, David Kates, Deputy Chairman, stated that a public servant does not waive the Bill of Rights when he assumes employment in the public service. Nevertheless, he held that "in assessing the reasonableness of the employer's decision to discipline", while taking into account "the prevailing societal values that are shared by the citizenry and that find their expression in the *Bill of Rights* and the recently enacted *Charter of Rights*," an adjudicator is "entitled, indeed obliged, in reviewing the employer's actions to address [himself] to the issue of whether an employee's continued job security is dependent on his exercise of restraint."

The issue, then is where the line is to be drawn between permissible and impermissible public utterance by public servants. In *Fraser*, David Kates, in examining this issue, said:

> Ideally [the] standard should accommodate both the Government's concern for a neutral, objective Public Service and the public servant's entitlement to enjoy, like any other citizen, the benefits of the open society of which he is a member. Differences, however, might arise where a public servant expresses criticisms of Government policy in public that may reflect a conflict of interest. In attempting to balance the competing interests of both the employer and the employee, a clash may inevitably occur. In that eventuality it may be incumbent upon the public servant to make a difficult choice. That is to say, it is contemplated as in any conflict of interest situation that, where the impairment of the employer's services may appear to result, the employee may be put to the election of choosing between the termination of the employment relationship and the continuation of the impugned activities that created the conflict.

Adjudicators have generally accepted the view expressed by E.B. Jolliffe in *Stewart* that:[138]

> By the legislation of 1967 employees and their bargaining agents were given the right to negotiate and enjoy the protection of collective agreements relating to their terms and conditions of employment, including the right to debate such matters publicly and privately.
>
> ...there is no doubt that employees entitled to bargain collectively are entitled to speak their minds about the subject-matter of their negotiations and to criticize the position taken by the employer's negotiators.

Critical statements that exceed these bounds have met with a variety of responses. In 1965, before the PSSRA was enacted, an appeal board under the then Civil Service Act, in *Kroeker*,[139] had enunciated "the position that constitutional practice in Canada requires that a civil servant refrain from making public his personal views attacking important matters of government policy." In *Vaillancourt et al.*,[140] Adjudicator Perry Meyer said that he accepted some of the statements in the *Kroeker* decision with regard to the position of a public servant under Canadian constitutional law. He held that the aggrieved employees did not restrict themselves to a criticism of working conditions, but went beyond that to criticize government policies, programs and principles. In *Stewart*, after holding that employees were entitled to debate publicly matters relating to their working conditions, Mr. Jolliffe went on to say[141] that the PSSRA did not give them

> ...the right to enter into public or political controversy in relation to matters which must be decided by elected representatives of the Canadian people in Parliament and in the Government or matters expressly reserved for management such as [section 7 of the Act].
>
> ...they are [not] entitled to attack publicly any Minister, deputy head or department in respect of matters remote from collective bargaining and closely associated with political controversy.
>
> ...[They must] refrain from attempting to defeat or frustrate what the employer is trying to do, whether the employer is wise or unwise in trying to do it.

In *Goyette and Guindon*,[142] Adjudicator P. Garant, suggested that the foregoing principle may be unduly restrictive. He said:

> Most judicial systems acknowledge that a public servant is bound by the "obligation to restrain himself", as it is commonly known, in political matters. This obligation is imposed on the public servant even in his private life, but its requirements vary according to his rank, the nature of his duties, the time and place his criticisms are made and finally, the manner in which they are made.
>
> ...it is important to note that this obligation of restraint is imposed on the public servant not only in the performance of his duties but also in his private life, provided that some connection exists with the performance of his duties.
>
> . . .
>
> We would prefer to qualify the absolute nature of [the] principle in [*Stewart*]. To disregard totally the connection that exists between the criticisms put forth and the duties carried out by the public servant is to run the risk of rendering devoid of meaning all freedom of expression with respect to government policies which concern the public servant only in his capacity as a private citizen.
>
> The public servant's place in the hierarchy and the nature of his duties are other factors [including the time and place where the criticisms occur] that must be taken into account, especially in order to assess the seriousness of the offence committed.
>
> ...if unwarranted criticisms are contained in . . . unpublicized letters or documents [addressed to superiors], the public servant may be guilty of disrespect or insubordination towards his superiors, but not of non-fulfilment of his obligation to restrain himself in political matters.

In *Fraser* the aggrieved employee had expressed publicly and vehemently his concern about the government's metric conversion program, as well as the Charter of Rights in what was then the proposed Constitution Act, and the Government's handling of the Polish situation. He also attacked the way in which the Government and the Prime Minister were administering the business of governing the nation. In the course of his endeavours, he attracted the attention of the media and became a media personality whose views were solicited for publication and dissemination. The Adjudicator's conclusions about the entitlement of a public employee to express his opinions may be dealt with under several heads:[143]

> Public criticism is not, in itself, a cause for discipline.
>
> ...a public servant who acts in a manner that undermines the credibility of his own department, its programs and officers engages in a direct conflict of interest deserving of a disciplinary response on the employer's part. . . . [A] public servant exceeds the bounds of permissible activity when it can be demonstrated that what was said or done in public directly or indirectly results in an impairment of the functions of the department in which he is employed or the performance of the duties and responsibilities required of his position.
>
> ...Situations where a public servant publicly criticizes a government policy outside the department in which he is employed may also create a conflict. [Involved in such a situation is] the possible public perception that the public servant has access to inside information with respect to a particular policy that ought to have remained confidential.
>
> ...[A] highly placed member of the Public Service bureaucracy, simply by virtue of the position he occupies and irrespective of the department in which he is employed, must exercise restraint in the public pronouncements he makes on Government policy. In that situation restraint is mandatory merely because of the public servant's proximity to the numerous councils and committees where Government policy originates.
>
> ...[A] public servant can [not] unleash accusations against his Government employer that include allegations that the Government lies to the people, or abuses its powers and engages in strategies that undermine the democratic process and still remain an employee.
>
> ...[N]o employer, whether the business it is engaged in is the promotion of automobiles, or newspapers or indeed national policies, . . . would tolerate abuse of that nature from any of its employees.
>
> ...Surely a relatively influential official . . . who publicly and vehemently accuses his employer, the Government of Canada, and the Prime Minister of autocratic and coercive behaviour is unlikely to instill confidence in a clientele that has a right to expect impartial and judicious treatment. . . . A public servant simply

> cannot be allowed under the rubric of free speech to cultivate distrust among members of the constituency whom he is obliged to serve.

The decision has caused a great deal of controversy, accompanied by calls from some quarters for the establishment of a parliamentary committee to consider what limits, if any, should be imposed on employees expressing publicly their opinions on government policies and practices. So far the government has not been favourably disposed to such a step.

On an application by Fraser to the Federal Court of Appeal, the adjudicator's decision was upheld; the Court supported the principles relied on by the adjudicator.[144] Leave to appeal to the Supreme Court of Canada has been granted but, at the time of writing, the appeal has not yet been heard.

The onus of showing that there has been impairment in the situations we have been discussing was dealt with by Jackett C.J. in *Stewart* (and his position was applied by Deputy Chairman Kates in *Fraser*). Jackett C.J. said:[145]

> Having regard to counsel's emphasis on the need for proof of actual impairment or detriment, I may say that, in my view, where there is a group of employees working as a unit, there must *prima facie* be direction, which involves a directing mind to which the members of the unit must, as far as their work is concerned, submit, for, otherwise, there can be no coherent effort by the group but only chaos. It follows, that, where an important member of such a unit challenges the legally established leader of the unit, *prima facie* it will impair the working of the unit; and evidence of such a challenge gives rise to a factual presumption of misconduct.

The views expressed by Jackett C.J. were affirmed by the Court in the *Fraser Case* by Pratte J. In that case Thurlow C.J. added:

> Whether conduct in respect of which an employee is disciplined destroys or detracts from the employee's usefulness to the employer is not a question of law. Nor is the question whether disciplinary action awarded by the employer is appropriate a question of law. Both are questions of fact which under the *Public Service Staff Relations Act* . . . are committed to the board for decision. Neither that Act nor the *Federal Court Act* . . . commits them to this court for decision.

Rights of Officers of Bargaining Agents

An officer of a bargaining agent has no greater right, even when authorized by the members of his organization, to make critical public statements about the government, its policies or programs than has a rank-and-file member of a bargaining agent or any other public servant. As the Chief Adjudicator said in *Stewart*:[148]

> It was suggested during argument that the president of a union has a special responsibility to speak on behalf of union members, and that he must be concerned about all conditions affecting their terms of employment. In a general sense, it is undoubtedly true that union officers have special responsibilities, and it has been so recognized, both in . . . the [PSSRA] and in pronouncements by the Public Service Staff Relations Board. It does not follow, however, that a union officer possesses some special licence to go far outside "the ambit of the legislation" and denounce his department or a minister on any and every subject.

Some Other Decisions on Adjudicability

There are a number of other areas where, although it cannot be said that there is an administrative procedure for redress provided under the Public Service Employment Act, the jurisdiction of adjudicators to deal with grievances alleging disciplinary action has been questioned because of provisions of that Act. Each of these provisions must now be examined.

Rejection on Probation

Section 28 of the Public Service Employment Act empowers a deputy head to notify an employee at any time during his probationary period that he intends to reject the employee for cause at the end of such notice period as the Public Service Commission may establish. Where the deputy head gives such a notice, he must furnish to the Commission his reasons for doing so. The Commission has no authority to question the validity of cause assigned for rejection by the deputy head. If the rejected employee has been appointed (that is, promoted) from within the public service, the Commission must place his name "on such eligibility list and in such place thereon as in the opinion of the Commission is commensurate with his qualifications." The Commission has a discretion as to whether it will do so in other cases. It has never been suggested by anyone in authority that this type of 'relief' can be regarded as an administrative procedure for redress that would preclude a probationary employee presenting a *grievance* with respect to the termination of his employment.

Under the general labour-relations legislation, there are some collective agreements that expressly give the employer a discretion not subject to review by a third party to terminate the employment of a probationary employee at will when he first enters the employ of an employer. In *Caron*,[147] the first case that came to adjudication under the PSSRA, the Chief Adjudicator, Professor H.W. Arthurs, said, "In the private sector, arbitrators have generally held that a new employee appointed on probation can be dismissed without the showing of cause. However, I know of no case where a permanent employee was dismissed (or exposed to termination of employment) merely because he failed to meet the demands of a new job into which he was promoted. In such cases, the employee is simply returned to his former classification." In the federal public service, the probationary principle applies whenever an employee who has attained permanent status in one position is promoted to a higher position, in that the deputy head may reject him for cause; and rejection does not automatically result in his return to his former position or, indeed, to any other position in the public service.[148] The fact that the demoted employee's name is placed on an eligibility list provides him with no assurance that he will be re-employed, for no position commensurate with his qualifications may open during the currency of the eligibility list.[149]

From the outset adjudicators have taken the position that they are entitled to entertain a grievance presented by an employee who has been rejected by a deputy head during the probationary period in order to ascertain whether the termination of employment really constituted disciplinary action resulting in discharge. In *Caron*, the Chief Adjudicator said:[150] "The [PSSRA] gives an employee the right to an adjudication of any disciplinary action taken against him which leads to his discharge. This right is not to be thwarted by the mere assertion of the employer that no question of discipline arises; neither is it to be frustrated by a razor-thin semantic distinction between 'discharge' and 'failure to appoint following probation'." The question concerning the jurisdiction of an adjudicator in such situations has come before the courts in a number of cases. What emerges from "the welter of adjudicatory and judicial opinion on this matter", as it has been aptly characterized,[151] is summed up in the decision of E.B. Jolliffe, Deputy Chairman, in *Goodale*,[152] as follows:

> There may be many more objections to jurisdiction in probationers' cases, but it can no longer be denied that when such an objection is raised, an adjudicator has a duty to inquire into the "jurisdictional facts" and must not accept or decline jurisdiction until it is established what these facts were. Moreover, it was clearly the view of five of nine judges of the Supreme Court in *Jacmain*[153] that, if it is proved to an adjudicator [that] a so-called "rejection" was in fact a disciplinary discharge, the adjudicator has a further duty.[154] That duty is — in the words of Section 96(1) and (2) of the P.S.S.R. Act — to "give both parties to the grievance an opportunity of being heard" and then "after considering the grievance . . . [to] render a decision thereon". This is exactly the approach taken by at least five different adjudicators. . . .[155] That approach seems to have been validated by [the decisions of the Supreme Court in] *Jacmain* and *Richard*, although there remains room for doubt as to the result if (in the words of *Dickson J.*) "there lurked in the background some cause which might justify rejection", a doubt which will perhaps be resolved in future cases. Ultimately it may become established that the line between "disciplinary action" and "rejection for cause" should be drawn where the effective or dominant cause, the *causa causans* of the termination, was one rather than the other. . . .[156]

Where adjudicators have held that a rejection on probation was, in essence, disciplinary action resulting in discharge, they have directed, in a few instances, that the employee be reinstated in employment and, where appropriate, that the probationary period be extended.[157] In other instances the remedy in such situations has been by way of monetary compensation.[158] As E.B. Jolliffe, Deputy Chairman, pointed out in *Goodale*:[159]

> In adjudicating on the reference of a grievance alleging *discharge*, the issue is whether or not employment has been lawfully terminated — having regard to the provisions of the *Financial Administration Act* — not the P.S.E. Act. Thus a decision reinstating a grievor in such a case is not a new 'appointment' but a decision that he was not lawfully discharged and has therefore continued to be an employee.

However, in the same case, where the Deputy Chairman found that the aggrieved employee (who had been rejected on probation and not for disciplinary reasons) had not been given adequate training during her probationary period as required by a provision of the applicable collective agreement, he held that "an adjudicator has no power to order reinstatement in a case where the grievance is based on a violation of the agreement *and not on an unlawful discharge*. The distinction is decisive." He therefore directed that the employee receive monetary compensation.

Differences in Onus of Proof in 'Disciplinary' and 'Probationary' Grievances

Procedure in cases where a probationary employee alleges that his termination of employment was for disciplinary reasons differs from the common procedure adopted in connection with disciplinary grievances where probation is not a factor. In the latter situation, it is generally accepted, both in the private sector and under the PSSRA, that in disciplinary cases the burden of proof rests on the employer. In *Stewart*, for example, the Chief Adjudicator, in discussing the onus of proof in adjudication proceedings, said:[100]

> The Employer, having initiated the charge or allegation and having taken what its officers consider to be appropriate disciplinary action, with full knowledge of the grounds for doing so, is expected to be prepared to disclose the grounds and to justify its action if the dispute reaches adjudication.
>
> In other words, it is considered by adjudicators — and it has never been disputed by counsel for Employers in the Public Service — that in a disciplinary case under paragraph 91(1)(b) the Employer must accept the onus of proof, the burden of showing that the disciplinary action was justified *and* that the penalty was appropriate.

In *Jones et al.*,[101] a number of grievances related to disciplinary action taken by the employer against designated employees who, the employer alleged, had engaged in a strike. Deputy Chairman Kates, relying on a decision of the Supreme Court of Canada in *Strasser* v. *Roberge*,[102] held that the onus rested on the employees to establish that their absence from work was attributable to legitimate cause. In relation to the evidence presented to him that the aggrieved employees were ill at the material times, he remarked that arbitrators are loathe to disturb medical opinion, and that there is an onus on the employer to show why medical opinion ought to be discounted. However, that obligation is met where it appears that such opinion is tainted by the failure of the attending physician to take all material information into consideration, such as, in the instant situation, that the employee was a designated employee and that a strike was in progress. In determining whether, in his discretion, he should mitigate the severity of the discipline imposed, the Deputy Chairman took note of the fact that the employees had treated in an irresponsible manner the obligation of designated employees to assure the public of minimal designated services in the course of a lawful strike.

Where the employer shows some plausible basis for dismissal, an onus of explanation shifts to the employee.[163] In probation cases under the PSSRA, the procedure to be followed is as set out in *Goodale*,[164] where E.B. Jolliffe, Deputy Chairman, said:

> [In *Morrison*,[165] the Board held that] a rejected probationer bears the onus of establishing that his rejection was in fact disciplinary action camouflaged as a "rejection" under Section 28 of the P.S.E. Act, and only after he succeeds in doing so will jurisdiction on the merits be accepted by the adjudicator.
>
> The onus doctrine in respect of probationers has been adhered to consistently by adjudicators. Thus, unlike cases involving what are admittedly discharges (where the employer is required to go first and establish a *prima facie* case) the rejected probationer must go first and attempt to show that disciplinary action resulting in discharge has been taken against him.[166]

It has been held that in discharging the burden, the aggrieved employee must show that on the balance of probabilities, the termination of his employment was clearly on the side of his contention that the effective cause of his discharge was disciplinary. If the grievor does not succeed

> ...in discharging this burden of proof, there would appear to subsist a prima facie presumption that his rejection on probation was in virtue of the provisions of the Public Service Employment Act, and was not disciplinary sanction within the meaning of the Public Service Staff Relations Act. It is up to the grievor to rebut this presumption. . . .[167]

Resignation and Abandonment

There are two other areas where, under the Public Service Employment Act, an employee's employment may be terminated, and where the jurisdiction of an adjudicator has come into question. These areas are resignation and abandonment of a position. An employee may resign from the public service by giving to the deputy head notice in writing of his intention to resign. Under section 26 of that Act, he ceases to be an employee on the day on which the deputy head accepts in writing his resignation. Again, if an employee is absent from duty for a period of a week or more, the deputy head *may*, under section 27, by an appropriate instrument in writing to the Public Service

Commission, declare that the employee has abandoned his position, and he thereupon ceases to be an employee. Such a declaration may be made where the absence is "otherwise than for reasons over which, in the opinion of the deputy head, the employee has no control[168] or otherwise than as authorized or provided for by or under the authority of an Act of Parliament".[169]

In an early case, *Klingbell*,[170] Adjudicator W.S. Martin held that he had no jurisdiction to determine whether a severance from employment that flows from a declaration of a deputy head that an employee has abandoned his position constitutes a discharge arising out of disciplinary action. He added that if the deputy head had acted illegally, the forum of relief must lie elsewhere. In subsequent cases, however, especially in recent years, in light of the decisions of the courts[171] adjudicators have held that they did have jurisdiction in such circumstances. As E.B. Jolliffe, Deputy Chairman, said in *Mader*:[172]

> ...the power to make a declaration of abandonment still exists and may be exercised in appropriate circumstances. This does not mean that the authority may be resorted to in bad faith or as a subterfuge or device for denying redress when the real basis for taking action is disciplinary. Nor does it mean that a declaration can be made when the facts do not correspond to the requirements of section 27 [of the Public Service Employment Act]. However, if there is no evidence of disciplining being contemplated on other grounds, and if abandonment has actually occurred in the form of an absence for seven days or more, an absence not authorized by management or by law, it is the Employer's prerogative to rely on section 27.

The principles that adjudicators have applied in cases where the employer's objection to jurisdiction is based on an accepted resignation of the aggrieved employee are much the same as those that are applicable to cases where the employer relies on a declaration of abandonment as a bar to adjudication. Adjudicators have held that they have jurisdiction to inquire into the circumstances to ascertain whether the employee did resign of his own free will, and whether the resignation was duly accepted;[173] if they do find that there has been no valid resignation, they have held that they have jurisdiction to determine whether the alleged termination was *in fact* disciplinary in character. In *Théoret*,[174] for example, Adjudicator P. Garant stated:

> We must decide . . . exactly what is meant by the weighing of jurisdictional facts in a case involving a resignation or a purported resignation. In our opinion, it means that the adjudicator must decide whether all of the acts which preceded the resignation — and which probably prompted it — have disciplinary overtones. He must decide, on the basis of the circumstances, whether the grievor resigned, willingly or unwillingly, voluntarily or under duress or otherwise, in order to avoid an imminent disciplinary discharge. We feel that if this is the case, the adjudicator may determine whether the discharge is valid.[175]

Where there was no evidence of disciplinary action, it was held in *Harmatiuk*,[176] that an adjudicator had no jurisdiction to determine whether a resignation was valid or was a nullity as, for example, where it is alleged that an employee was coerced or harassed into submitting a resignation. However, in *Bie*,[177] L. Mitchell, Deputy Chairman, found that the aggrieved employee did not terminate her employment voluntarily, that she had been pressured by her superior to resign, and that the reason for the severance of the employee could not be considered otherwise than as "punishment for being persona non grata to several Indian officials even while acknowledging that the position of those Indian officials was unjustified and unwarranted." He held that the punishment in this case was tantamount to a discharge for no just cause and directed that the employee be reinstated.

Lay-Off

Termination of employment by way of lay-off is another matter that is dealt with in the Public Service Employment Act. Section 29 provides as follows:

> (1) Where the services of an employee are no longer required because of lack of work or because of the discontinuance of a function, the deputy head, in accordance with regulations of the Commission, may lay off the employee.
>
> (2) An employee ceases to be an employee when he is laid off pursuant to subsection (1).

The section then goes on to provide for a laid-off employee certain entitlements to appointment to a new position for which he may be qualified.

In a few early cases in which a grievance referred to adjudication alleged that a lay-off was, in essence, disciplinary action resulting in discharge, adjudicators appear to have taken the position that they had jurisdiction to ascertain whether the termination of employment was disciplinary in character.[178] However, in *Bower*,[179] Adjudicator V. Melançon, although he found after a careful review of the evidence that there were no disciplinary overtones in the lay-off of the aggrieved employee, nevertheless took occasion to comment, after quoting section 90 of the PSSRA, that it seemed to him "that the grievor's complaint is not even a grievance within the meaning of the Act". The inference one may draw from this comment is that the priority given to a laid-off employee for reappointment is to be treated as an administrative procedure for redress provided for in or under an Act of Parliament; this would bar lay-off from being regarded as a grievance.[180] However, this comment must be weighed in light of another statement by the adjudicator:[181]

> It was necessary, in my view, for the grievor to be able to adduce clear evidence that he was the object of disciplinary action. The evidence shows, rather, a series of administrative decisions by the Employer in the exercise of proper authority, namely, the closing of a fire station, the abolition of a number of fire-officer positions and the lay-off of a number of officers as a result of that abolition. This situation may actually constitute, in some cases, the imposition of disciplinary action. I would not wish this decision to be interpreted in any way as sanctioning in advance the use by the Employer of the provisions of various other Acts in order to circumvent those in the Public Service Staff Relations Act.

In *Théoret*,[182] Adjudictor P. Garant, although dealing with a grievance presented by a person who had submitted a resignation, expressed the view that an adjudicator had jurisdiction to inquire into the facts to ascertain whether a lay-off under section 29 of the Public Service Employment Act could properly be characterized as disciplinary action.

Application of External Law

Arbitrators in the private sector have entertained differing views on whether they should base their decisions in particular cases solely on the language of the collective agreement, or whether they are bound to consider, as well, any law applicable to the situation before them.[183] Since, under the PSSRA, there are limitations on the scope of bargaining,[184] it has been held that 'external law', as it has been called, must be taken into account by an adjudicator in arriving at a decision, and that if a provision of a collective agreement conflicts with a provision of a statute, the provision of the collective agreement must yield. In *Gloin*,[185] Adjudicator G.G. Brent said:

> The conclusion which this adjudicator thinks is indicated by the provisions of the *Public Service Staff Relations Act* is that an adjudicator's jurisdiction is limited by s. 95(2), s. 56(2) and s. 58 to interpret the collective agreement in a manner which is consistent both with the intent of the parties as indicated by language of the agreement and also with existing legislative provisions relating to terms and conditions of employment in the manner provided for in s. 56(2). It would seem obvious that an adjudicator's jurisdiction would be exceeded where the adjudicator ignored the express direction in s. 56(2) that the collective agreement could not provide for "the alteration or elimination of any existing term or condition of employment or the establishment of any new term or condition of employment. . . ." Therefore the adjudicator only has jurisdiction to interpret a collective agreement which, by law, is a document which must conform, *inter alia*, to the provisions of s. 58 subject to s. 56(2). An alternative way of reaching the same result would be to regard s. 56(2) as a legislative direction for interpreting the collective agreement between the parties.

The decision of the adjudicator was upheld by the Federal Court of Appeal[186] and, in *Goodale*,[187] Deputy Chairman E.B. Jolliffe indicated that in light of the Court's decision, a collective agreement must not be in conflict with subsection 56(2) of the PSSRA.[188]

Cost of Adjudication

Under the general labour-relations legislation, the applicable collective agreement usually deals with the expenses of grievance arbitration. Under the PSSRA, the remuneration and expenses of adjudicators have been included in the PSSRB's annual financial estimates and have been paid out of the PSSRB's funds. Subsection 97(1) of the Act makes the remuneration and expenses of an adjudicator named in a collective agreement a charge on the parties, which they are to bear equally. Subsection 97(2) of the Act also provides that each of the parties is to bear the expense of its nominee to a board of adjudication. In other instances — and this would apply to the remuneration and expenses of a chairman of a board of adjudicators — where the aggrieved employee is represented in the adjudication proceedings by a bargaining agent for the bargaining unit to which he belongs, the bargaining agent is liable to pay such part of the costs of adjudication as may be determined by the Secretary of the Board with the approval of the Board, and the amount payable may be recovered as a debt due to the Crown.[189] It has not been the practice to require any of the remuneration or expenses of an adjudicator to be paid by a bargaining agent; rather they are covered by the Board. The reason for this policy is that to levy a charge against a bargaining agent alone would give the appearance of discrimination, even though the employer, as government, pays its share of the cost through the moneys appropriated for the Board. Officials of the Treasury Board had suggested at one time that it might be possible to avoid the appearance of discrimination by having the Treasury Board levy a 'notional' charge on departments or agencies involved in an adjudication proceeding. However, the suggestion was not implemented.[190]

Implementation of Decisions of Adjudicators

Provision for the implementation of a decision of an adjudicator is made in subsections 96(4) and (5) of the PSSRA.

> (4) Where a decision on any grievance referred to adjudication requires any action by or on the part of the employer, the employer shall take such action.
>
> (5) Where a decision on any grievance requires action to be taken by or on the part of an employee or a bargaining agent or both of them, the employee or bargaining agent or both, as the case may be, shall take such action.

Remedies in Adjudication Proceedings under Section 98 of the PSSRA

The question has arisen of the nature of the remedy available to a bargaining agent or the employer where the reference to adjudication is made under section 98 of the PSSRA.[191] It has been contended on behalf of the employer that if, in such a reference, the adjudicator finds that an obligation under a collective agreement has not been observed, his jurisdiction is limited to making what amounts to a 'declaratory judgment'. This argument has consistently been rejected by adjudicators[192] on the ground that subsection 98(2) makes section 96 applicable to such a reference; subsections 96(4) and (5) are therefore applicable. Their position has been upheld by the Federal Court of Appeal.[193] It has been held that in a proper case, pecuniary redress may be available, provided that the adjudicator can fashion an appropriate remedy.[194] To enable an adjudicator to determine what action should be taken by a party in such circumstances, adjudicators have held that the reference to adjudication must specify clearly the nature of the remedy it seeks.[195]

On a reference under section 98 of the PSSRA, it has been held that in general no remedy can be afforded an individual who is not before the adjudicator.[196] An exception to this principle has been made in instances where the person primarily concerned is precluded from presenting a grievance on his own behalf because he has ceased to be an employee: for example, if he had died[197] or had been laid off[198] before the grievance was filed.

The remedies available to a person or party where the decision of an adjudicator is not implemented will be dealt with in Chapter 12, below.

Notes

1. Since the decision of the Privy Council in *Young* v. *Canadian Northern Railway* (1931) 1 D.L.R. 645, it has generally been accepted in Canada that collective agreements are not enforceable at common law. For a discussion of the enforceability of collective agreements at common law, see B. L. Adell, *The Legal Status of Collective Agreements in England, the United States and Canada* (Kingston: Queen's University, Industrial Relations Centre, 1970). However, since modern labour-relations statutes in Canada gave binding effect to collective agreements, special remedial procedures for the enforcement of such agreements had to be established under these statutes. It should be noted that all Canadian labour-relations statutes, except the Saskatchewan Trade Union Act, R.S.S. 1978, c. T−17, prohibit strikes during the term of a collective agreement. For the development of legislative policy concerning remedial procedures for the enforcement of such agreements, see, for example, Ontario Collective Bargaining Act, S.O. 1943, c. 4, s. 14; Wartime Labour Relations Regulations, P.C. 1003, February 17, 1944; Industrial Relations and Disputes Investigation Act, S.C. 1948, c. 54, s. 19; Ontario Labour Relations Act, S.O. 1950, c. 34, s. 32; Canada Labour Code, R.S.C. 1970, c. L−1, s. 155 as amended by S.C. 1972, c. 18.

2. See pp. 561–65, below.

3. For a discussion of the classes of persons who are treated under the Act as persons employed in a managerial or confidential capacity, see above, Chapter 2, p. 31 ff. However, the grievance procedure is not available to persons employed in the federal public service who are excluded from the definition of the term 'employee' for any reason other than that they are persons employed in a managerial or confidential capacity: see above, Chapter 2, pp. 27–31.

4. PSSRA, s. 2: "grievance".

5. See, for example, *Bath* (1971) PSSR Reports M 2368; *Clark* (1972) PSSR Reports M 2721; *Gloin et al.* (1977) Adjudication files 166–2–2990 to 166–2–2994.

   For a discussion concerning the referability to a conciliation board of a proposal that a person who had ceased to be an employee before an agreement was entered into should be entitled to benefits under a retroactivity provision in an agreement, see above, Chapter 4, p. 167.

6. *Clark* (see note 5, above) at M 2729. In *Public Service Alliance of Canada (In re Estate of T.R. Gordon) and the Treasury Board* (1970) PSSR Reports M 1549, resort was made to s. 98 of the PSSRA (see below, p. 598) to determine whether, under the provisions of a collective agreement respecting severance pay, the estate of a person who, at the time of his death, was an employee in the bargaining unit to which the agreement applied was entitled to such pay. No question of jurisdiction was raised by the employer in this case.

7. (1977) PSSRB file 139–2–7.

8. *The Queen in right of Canada as represented by the Treasury Board* v *Lavoie* (1978) 1 F.C. 778.

9. *Ibid.*, at 783.

10. See below, pp. 588–92, concerning the jurisdiction of adjudicators in cases where a person is 'rejected' during his probationary period.

11. Pratte J., in the same case, p. 784, said: "I agree with the Chief Justice that the introductory words of section 90(1) [of the PSSRA] include a person who feels himself to be aggrieved as an employee."

12. (1978) 2 F.C. 307. The employees affected had been rejected during their respective probationary periods, but the issue in the case was the construction to be placed on the provisions relating to technological change in the applicable collective agreements. There was no allegation by the aggrieved persons that the rejection masked disciplinary action.

13. P. 311.

14. Thus the Canada Labour Code, R.S.C. 1970, c. L–1, contains no provision for the establishment of a grievance procedure. In the Ontario Labour Relations Act, R.S.O. 1980, c. 232, the only reference to a grievance procedure is to be found in a model arbitration clause. This clause states that the arbitration process is to be applicable to the parties "after [they have exhausted] any grievance procedure established by this agreement" (subsec. 37[2]).

15. Under other labour-relations statutes in Canada, the right to present a grievance generally flows solely from the collective agreement; it is therefore to be anticipated that the agreement will contain an appropriate procedure for that purpose. In the case of the PSSRA, the right to present a grievance flows from the Act itself and, as was pointed out above (see p. 552), is available to persons not covered by a collective agreement. In addition the right to present a grievance accrued as soon as the Act came into force and well before any collective agreement was entered into. The PSSRB had to be given authority to issue regulations to meet situations of this sort.

16. As we have noted earlier, a person "who is required by reason of his duties and responsibilities to deal formally on behalf of the employer with a grievance presented in accordance with the grievance process provided" by the PSSRA is treated under the Act as a person employed in a managerial or confidential capacity. For a discussion of this point, see above, Chapter 2, pp. 35–37.

17. (1971) PSSR Reports M 2465 at M 2470.

18. *Ibid.*, at M 2470.

19. SOR/67/200, April 26, 1967.

20. Some persons have expressed the view that the effect of s. 7 of the PSSRA (see above, Chapter 4, pp. 183–85) is to exclude classification grievances from the operation of the provisions discussed in the text. This position has not been put to the PSSRB by anyone with authority to speak for the employer. Indeed, it was at the instance of the Secretariat of the Treasury Board that the *Regulations* of the PSSRB, fixing time limits and procedures for processing grievances, were amended, on 1 September 1968, to make specific provision relating to classification grievances. See J. Finkelman, *Employer-Employee Relations in the Public Service of Canada: Proposals for Legislative Change* (Ottawa: Information Canada, 1974) (hereafter referred to as the *Finkelman Report*), Part I, pp. 199–208, for recommendations about the processing of classification grievances.

Most collective agreements expressly exclude "matters arising from the classification process" from their provisions for grievance procedure.

21. Concerning whether a supervisor or local officer-in-charge is to be regarded as a person employed in a managerial or confidential capacity because he has responsibility to forward a grievance to the authorized representative of the employer, see above, Chapter 2, pp. 35–36.

22. The term 'grievance' is defined in s. 2 of the PSSRA as "a complaint in writing".

23. (1972) PSSR Reports M 3120.

24. *Mader* (1976) PSSR Reports M 4426 at M 4427. In *Lavoie* (1977) PSSRB file 139–2–7, the Board adopted the position outlined by Mr. Jolliffe.

25. In *Pyper et al.* (1971) PSSR Reports M 2478 at M 2481, Adjudicator J.F.W. Weatherill said: "Late filing of a grievance is not, in my view, a mere 'technical irregularity'. . . . The time limits are not directory, but are mandatory, and an adjudicator has no power to grant an extension of them." So also *Halliday et al.* (1971) PSSR Reports M 2380. See p. 570, below, concerning the circumstances in which time limits may be treated as having been 'waived'.

26. Subsec. 89(1), as amended by SOR/78/840 (PSSR Reports D27). For a discussion of the problems that have arisen over the years with regard to the PSSRB's jurisdiction to extend the time for presentation of a grievance, see *Dunaenko* (1971) PSSR Reports M 2465; the decision of the New Brunswick Supreme Court, Appeal Division, in *Re The Queen and Holder et al.* (1974) 51 D.L.R. (3d) 102; *Assinewe* (1978) PSSRB file 149–2–20; *Olivieri* (1980) PSSRB file 149–2–24; *Dunham* (1981) PSSRB file 149–2–39; the decision of the Federal Court of Appeal in *In re Kates* (A–467–81, unreported); a later decision in *Dunham* (1982) PSSRB file 149–2–39. In the last-mentioned case, David Kates, Deputy Chairman of the PSSRB, considered that all doubts about the Board's jurisdiction in such circumstances had now been set at rest by the decision of the Federal Court of Appeal.

27. (1977) PSSRB file 149–2–17.

28. (1982) PSSRB file 149–2–39.

29. See note 26, above, at M 2475–M 2476.

30. The breach of a duty imposed by law, whereby some person acquires a right to an action for damages.

31. See also *Assinewe*, note 26, above.

32. See note 27, above.

33. The *Finkelman Report* (Part I, p. 214) noted that

> ...there are to be found in the collective agreements that have been entered into in the Public Service a considerable number of variations of, and departures from, the P.S.S.R.B. Regulations and Rules of Procedure in this regard. In the result, employees in several bargaining units working side by side may have to process their grievances in different fashion and under differing time limits. Members of management in the same hierarchy and charged with the duty and responsibility of dealing formally on behalf of the employer with grievances have been confronted with a variety of procedural rules that they may be called upon to apply.

Mr. Finkelman thereupon recommended that the PSSRB should have the exclusive authority to make the necessary regulations, but that to meet special circumstances, the Board should be empowered to vary the general regulations on application of the parties.

34. See, in this connection, discussion concerning *Dunaenko*, p. 554 above.

35. For example, the collective agreement for the medicine bargaining unit, the collective agreement for the foreign affairs bargaining unit, and agreements covering five units in the Communications Security Establishment of the Department of National Defence.

36. Subsec. 95(1) of the PSSRA declares that subject to any regulation made by the PSSRB, no grievance may be referred to adjudication or adjudicated upon until all procedures established for presenting the grievance up to and including the final level have been complied with.

37. No attempt has been made in this chapter to discuss rulings of adjudicators on grievances concerning the application or interpretation of the provisions of collective agreements or arbitral awards, except where required in connection with some other point of discussion. The principles applicable to the construction or administration of collective agreements and arbitral awards in the public service do not differ substantially from those applicable in the private sector. See, in this connection, D.P. Olsen, "Adjudication under the Public Service Staff Relations Act (Canada) — A Comparative Analysis of the Interpretation and Application of Collective Agreements in the Federal Public Service and the Private Sector" (Montreal: unpublished thesis submitted to the Institute of Comparative Law, McGill University, 1979).

38. That is, to arbitration. The term 'arbitration' was pre-empted to apply to the resolution of interest disputes. (See definition of term 'process for resolution of a dispute' in s. 2 of the PSSRA.)

However, the French version of the Act, which uses the term *arbitrage* in this connection (see definition of term *méthode de règlement des différends* in s. 2.), also states that an employee "peut renvoyer le grief à l'arbitrage" (subsec. 91[1]).

39. See above, Chapter 9, pp. 416–19.

40. Grievances respecting disciplinary action are, of course, always referable to adjudication.

41. (1971) PSSR Reports M 2478 at M 2480–M 2481. In *Canadian Air Traffic Control Association and Treasury Board* (1980) Adjudication file 169–2–357, it was held, on a reference under s. 98 of the PSSRA (See below, p. 564), that a reference by the bargaining agent during the freeze period was adjudicable. This reference related to the amount of union dues to be checked off by the employer from the salaries of employees in the bargaining unit, as had been provided in the expired collective agreement. See also *Air Traffic Control Case* (1981) PSSRB files 148–2–61 and 148–2–62; *Her Majesty the Queen and Canadian Air Traffic Control Association* (1981) 128 D.L.R. (3d) 685.

42. (1973) PSSR Reports M 3151 at M 3159.

43. *Letourneau et al.* (1974) PSSR Reports M 3217. The Chief Adjudicator commented in his decision (at M 3236) as follows:

> It is of historical interest, perhaps worthy of note at this time, that in 1969 and 1970 a number of non-adjudicable grievances were submitted to adjudication by the employer and the Public Service Alliance of Canada on the agreed basis that they would be heard and determined by myself or another adjudicator as *persona designata*. Of course those precedents have no effect whatever on subsequent cases; they were special adjudications made possible only by voluntary agreement of the parties at the time.

44. *Holland* (1979) PSSR Reports M 2483; *Mackie* (1973) PSSR Reports M 3096.

45. (1979) Adjudication file 166–2–5882.

46. (1977) PSSR Reports M 4565 at M 4584. In *Baril* (1977) Adjudication file 166–2–2943, Adjudicator P.A. Lachapelle refused to follow the decision of the Chief Adjudicator in *Salter et al.*; he held that a grievance complaining of a warning letter was adjudicable under a provision of a collective agreement which stated that in cases of discipline, the burden of proof rested on the employer. On the other hand, in *Decruz* (1978) Adjudication file 166–2–3063, Adjudicator J.P.W. Weatherill followed *Salter et al.* concerning a grievance that related to the same provision as the grievance in *Baril*. On an application for a writ of prohibition in connection with the decision of the adjudicator in *Baril*, the Federal Court, in *Attorney-General of Canada and Lachapelle et al.*

(1979) 1 F.C. 377, held that the adjudicator had erred in law in concluding that he had jurisdiction in the matter. The Court, in effect, approved the decision in *Salter et al.*

47. The same conclusion was reached by Marceau J. in *Attorney-General of Canada and Lachapelle et al.* (above), p. 382.

48. (1974) PSSR Reports M 3263 at M 3268.

49. (1973) PSSR Reports M 3133 at M 3138.

50. See also *Tulk* (1971) PSSR Reports M 2029.

A contrary conclusion was reached in *Campbell et al.* (1971) PSSR Reports M 2163 at M 2170, where the Adjudicator found that there was a pre-existing right expressly protected by the agreement, and the aggrieved employees could say that the agreement was wrongly applied to them, even though the agreement did not require existing conditions to remain in force until changed after consultation.

51. Emphasis added.

52. (1969) PSSR Reports M 462 at M 464.

53. The same principle was applied in *Southern* (1969) PSSR Reports M 483; *Bourget* (1969) PSSR Reports M 692; *Cain* (1971) PSSR Reports M 1825; and *Dobson* (1971) PSSR Reports M 1799.

54. (1972) PSSR Reports M 2531 at M 2549 and M 2550.

55. (1969) PSSR Reports M 832 at M 837.

56. *Ibid.* at M 828.

57. (1972) Adjudication file 166–2–585.

58. (1972) Adjudication file 166–2–620.

59. (1974) PSSR Reports M 3495 at M 3498.

60. (1974) PSSR Reports M 3311.

61. (1974) Adjudication file 166–2–1453.

62. See note 53, above.

63. The *Finkelman Report* (Part I, pp. 179–80) recommended that the PSSRA

> ...be amended to permit a bargaining agent and the employer to include in a collective agreement a provision that the bargaining agent should be entitled to present on behalf of employees a grievance relating to the interpretation or application in respect of identified employees of a provision of a collective agreement or an arbitral award. The bargaining agent should be required to notify in writing any employee to be identified in such a grievance of its intent to file the grievance and, if the employee advises the bargaining agent in writing that he does not wish to be associated with the grievance, the bargaining agent should not be entitled to process the grievance in so far as it relates to such employee.

64. The Canada Labour Code seems to give an employee the right to refer a grievance to arbitration.

65. Concerning a proposal that an employee should not be entitled to present any grievance without the approval of his bargaining agent, see above, Chapter 4, p. 189.

66. In *Canadian Union of Postal Workers and Turmel and Treasury Board* (1977) Adjudication file 166-2-3104, a grievance referred to adjudication was, in fact, a grievance presented by the bargaining agent and not by Mr. Turmel acting in his capacity as an employee. E.B. Jolliffe, Deputy Chairman of the PSSRB, dismissed the grievance for lack of jurisdiction. In his decision, after quoting ss. 91 and 98 of the PSSRA, he said:

> The simple juxtaposition of these two sections shows clearly the fundamental difference between the two remedies, the first being individual in nature and the second, collective in nature. As counsel for the employer indicated, the [PSSRA] uses the word "employee" in sections 90 and 91. Conversely, in section 98, the words "employee organization" or "bargaining agent" are used. Moreover, these two remedies are mutually exclusive. In fact, one of the prior conditions for a reference under section 98 is that enforcement of the obligation cannot be the subject of a grievance under section 91. Conversely, recourse under section 91 is available to an employee only if the interpretation or application in *respect of him* of a provision of a collective agreement [is] involved.

67. Under the Act, as originally enacted, this provision referred to the chief adjudicator. The Act was amended in 1975 (S.C. 1974–75–76, c. 67, s. 27) and now provides that the reference is to be made to the PSSRB.

68. See, in this connection, *Estate of T.R. Gordon*, discussed in note 6 above.

69. (1971) PSSR Reports M 1869.

70. *Professional Association of Foreign Service Officers and the Treasury Board* (1971) PSSR Reports M 1838 at M 1859. The Chief Adjudicator in his decision said (at M 1858–M 1859):

> There is of course a certain genus of grievance presented by an employee, ostensibly seeking enforcement of an alleged obligation to him, but obviously advanced on behalf of a class of employees rather than a single individual. The result may or may not be accepted by the parties as the result of a test case. Such grievances lie outside the walls of s. 98 and within those of s. 91, inconvenient though that may be. . . .

71. In *Dooling* (1971) PSSR Reports M 1735, Adjudicator Meyer held that in cases involving the interpretation of an agreement, "there must be a continuing willingness on the part of the Bargaining

Agent to represent the grievor. . . . [T]he necessity to obtain . . . consent and approval in writing before a referral to adjudication is possible must imply of necessity a concomitant right to the employee organization to withdraw such consent" (at M 1742 and M 1743). Upon withdrawal of the consent, the grievance ceases to be adjudicable. See also *Presley* (1972) PSSR Reports M 2524. In *Hislop* (1970) PSSR Reports M 946, it was held that consent of a local union of a bargaining agent, where authority on the bargaining agent's behalf was not delegated, did not meet the requirements of the PSSRA. In *Lachance* (1974) PSSR Reports M 3398, a grievance by a member of the Letter Carriers Union of Canada (LCUC), then a component member of the Council of Postal Unions, which was not supported by LCUC but was approved by the Canadian Union of Postal Workers (CUPW), the other component member of the Council, was held adjudicable since it was endorsed by an officer of CUPW who was authorized to endorse grievances on behalf of the Council.

For a discussion of whether a bargaining agent has a duty fairly to represent an employee in the presentation of a grievance, see below, Chapter 12, pp. 632–35.

72. See above, Chapter 2, p. 31 ff.

73. The *Finkelman Report*, Part I, pp. 230–31, recommended that "Persons identified as employed in a managerial or confidential capacity should not retain the right they presently have to invoke the assistance of an employee organization in processing their grievances except for grievances that arose prior to the time when the person was identified."

74. S.C. 1974–75–76, c. 67, s. 24.

75. Paragraph 94(2) (*c*) as amended by S.C. 1974–75–76, c. 67, s. 26. Before the amendment, the selection was made by the chief adjudicator. A deputy chairman of the PSSRB has now been assigned responsibility for administration of the adjudication system formerly discharged by the chief adjudicator. Although, under the Act as amended, it would be possible for the PSSRB to select a panel of the Board, rather than a single member, to hear and determine a particular grievance or group of grievances, such a course has been followed in only two instances. In the *Gray Case* (1977) PSSR Reports M 4592, where the grievance was referred to a division of the PSSRB consisting of three of its deputy chairmen, the issue was whether a substantial number of employees were entitled to severance pay under the terms of a collective agreement during the period when they were 'laid off' because of lack of work during a lawful strike by 'inside' postal workers. A majority of the division of the Board held that there was such an entitlement. The decision of the PSSRB was quashed by the Federal Court of Appeal: *Attorney-General of Canada* v. *Gray*

(1978) 1 F.C. 808. Leave to appeal to the Supreme Court of Canada was denied. A three-member board of adjudication was also established in *Galbraith* (1977) PSSR Reports M 4551 on a grievance similar to the one presented in *Gray*.

76. Under the PSSRA as originally enacted, the chairman was to be an adjudicator. No board of adjudication was ever established under this provision. During the first few years after the Act came into force, there were a few instances in which an aggrieved employee requested the establishment of a board, but the employer objected. In recent years a few requests have been made by employees in disciplinary cases, but these requests were withdrawn when the aggrieved employee was informed that he would have to bear the expense of his nominee to such a board. (See below, pp. 596–97.)

77. S.C. 1978–79, c. 1, s. 5.

78. (1969) PSSR Reports M 853 at M 856.

79. See *Rivney Case* (1971) PSSR Reports K 695 at K 698.

80. (1971) PSSR Reports M 946.

81. *Ibid.* at M 951.

82. (1972) PSSR Reports M 2782 at M 2784–M 2786.

83. See, for example, *Caron* (1967) PSSR Reports M 21 at M 29; *O'Hara* (1967) PSSR Reports M 50 at M 59; *Cathcart* (1970) PSSR Reports M 913 at M 923; *Scotter* (1971) PSSR Reports M 2123 at M 2133–M 2134.

84. See, however, *Doyon* v. *Public Service Staff Relations Board and Garant* (1979) 2 F.C. 190, where Pratte J., in dealing with the question whether, under s. 25 of the PSSRA, an adjudicator had authority to amend his decision, said (at 191):

> ...an adjudicator should not be seen as synonymous with the Board. The only relationship between the two would seem to be that the adjudicator is often a member of the Board and that, under section 92 *et seq.*, the Board plays an administrative role in the reference of grievances to adjudication.

85. Compare the model clause in the Ontario Labour Relations Act, R.S.O. 1980, c. 228, subsec. 44(2) which provides that "The decision of a majority is the decision of the arbitration board, but if there is no majority the decision of the chairman governs."

86. In *Derochie* (1970) PSSR Reports M 1661 at M 1669–M 1670, the Chief Adjudicator said:

> All that I have said is subject to the over-riding principle that an adjudicator is never called upon to interpret language which is not ambiguous. . . . An adjudicator is neither a conciliator nor a mediator, and it is wholly beyond his jurisdiction to rewrite or amend a badly drafted clause.

> . . .
>
> There are no exceptions to that rule, even where the disputed clause is grammatically questionable or if its results seem inequitable, anomalous or nonsensical. It is only when the language itself is capable of being reasonably construed in two or more different senses that an adjudicator is competent to construe it. . . .

87. In the original Act the following additional words occurred here: "and the manner in which and the time within which a grievance referred to adjudication shall be referred by the chief adjudicator to an adjudicator." In view of the 1975 amendments to the Act, paragraphs (*c*) and (*d*) may be redundant except, perhaps, as they relate to adjudicators named in a collective agreement.

88. (1970) Adjudication files 166−2−216 and 166−2−217.

89. See also *Pyper* (1971) PSSR Reports M 2478 at M 2481.

90. (1971) PSSR Reports M 2508 at M 2524.

91. See, in this connection, pp. 556−58, above.

92. (1973) PSSRB file 168−2−23.

93. For a discussion of the *Smith Case*, see *Burrows* (1973) PSSR Reports M 3185.

94. The effect of this provision, of course, is to exclude such matters from adjudication, as well, since subsec. 91(1) of the Act confers on an employee the right to process a 'grievance' to adjudication.

95. See Chapter 4, p. 189 ff., above.

96. Part I, pp. 176−77.

97. (1971) PSSR Reports M 2209 at M 2218−M 2219.

98. See also pp. 577−79, below.

99. (1971) PSSR Reports M 2465 at M 2477. See also at M 2469 and *Munro* (1969) PSSR Reports M 340.

100. (1974) 2 F. C. 407. Leave to appeal to the Supreme Court of Canada was denied.

101. Reference to dictionary definitions of the term 'incapable' raises grave doubts concerning whether Cooper could be said to have been 'incapable' of performing the duties of his position. It would be more reasonable to suppose that he had been subjected to disciplinary action for his conduct.

102. (1974) PSSRB file 168−2−36. About a year after his grievance was rejected at the final level of the grievance process, Cooper applied to the Chief Adjudicator for an extension of time to enable him to refer his grievance to adjudication. The Chief Adjudicator, being persuaded that there was an adequate explanation for the delay in referring the grievance to adjudication ([1972] Adjudication file 167−2−11), extended the time, and

Cooper referred the grievance to adjudication. It was not necessary for the Chief Adjudicator to deal with the question whether the grievance was adjudicable in the circumstances, and he directed that a hearing be held on the remaining issues. The employer immediately referred to the PSSRB, on the basis of s. 23 (since repealed) of the PSSRA, a question of law concerning whether an adjudicator had jurisdiction to entertain a reference to adjudication in the circumstances set out above.

103. See note 100, above, at 413. Emphasis added.

104. In *Théoret* (1977) Adjudication file 166–2–2462, Adjudicator P. Garant was dealing with a case of purported resignation. Without discussing whether s. 31 of the Public Service Employment Act precluded a grievance being presented, or being referred to adjudication by a person who had been released for incompetence or incapacity, and without mentioning the decisions of the court in the *Cooper Case*, Mr. Garant expressed the view that even where the reason given by the employer for the termination of employment was release for incompetence or incapacity, the effect of the later court decisions in *Jacmain* was that an adjudicator had jurisdiction to hear evidence to determine whether there were facts sufficient to warrant a conclusion that the termination could properly be characterized as disciplinary. See further, other cases discussed below, pp. 589–95, and notes 153 and 154, below.

The *Finkelman Report* (Part 1, pp. 194–95) recommended that the remedy for the removal of an employee from the Public Service, whether it be for misconduct or incompetence, should be provided for under the PSSRA and determined on reference by the PSSRB. The Special Joint Committee of the Senate and the House of Commons on Employer-Employee Relations in its *Sixth Report* (1975, p. 47:30), recommended that all action by the employer resulting in the termination of employment of an employee, whether it be for misconduct, abandonment of position, incompetence or incapacity, should be dealt with by the PSSRB. The D'Avignon Committee, in its *Report* (pp. 140–41) concurred in these recommendations.

105. See also *Caron* (1967) PSSR Reports M 21 at M 24 and M 25.

106. (1968) PSSR Reports M 313 at M 319 and M 321–M 322.

107. (1969) PSSR Reports M 749 at M 757.

108. (1969) PSSR Reports M 760 at M 767.

109. (1969) PSSR Reports M 794 at M 803 and M 818.

110. (1971) PSSR Reports M 1713 at M 1735. See also *Dunaenko* (1971) PSSR Reports M 2465.

111. (1971) PSSR Reports M 2183 at M 2191.

112. *Sproule* (1971) PSSR Reports M 2090 at M 2099. See also *Towers* (1971) PSSR Reports M 2104. In *Sproule* the Chief Adjudicator said (at M 2099):

> The real question to be decided is whether the weight of evidence proves the action taken to have been predominantly and effectively penal rather than a negative judgment on performance resulting in a decision to withhold an increase not merited by performance.
>
> ...An employee may be wholly innocent of any offence which would justify discipline of any kind, but the same employee may not be giving service at a level which would justify a higher salary.

113. *Moreland* (1977) Adjudication file 166–2–3080; *Lévesque* (1978) Adjudication files 166–2–3413 and 166–2–3414.

114. See *Ager* v. *The Queen* (1979) 1 F.C 475 at 484–85. See also *Lévesque*, above, where Deputy Chairman Falardeau-Ramsay said that:

> ...overtime work does not belong to employees as a right. The employer has the sole authority to decide if and when overtime work is required and who will be assigned to perform it, provided the provisions [of the collective agreement] are respected. . . . It follows [in the absence of relevant provisions in a collective agreement] that no employee can be assured in advance that he will be asked to perform overtime work and working overtime can even be considered a burden [or] a disadvantage for an employee. Consequently, a possible loss in overtime pay cannot be held as a determining factor in deciding the question of financial penalty.
>
> These comments also apply for loss of shift premiums and lieu days benefits, since it is the employer's prerogative to assign shift to an employee and to decide when an employee will be required to work on a holiday.

115. *Ménard* (1980) Adjudication file 166–2–5943.

In some instances, employees have sought relief against what they regarded as inequitable treatment by the employer by alleging in their grievances that the action of the employer was in reality disciplinary action that fell within the language of paragraph 91(1)(*b*) of the PSSRA.

Particularly before collective agreements were entered into, employees sometimes claimed that the action of the employer inflicted a financial penalty upon them, without even asserting that the so-called 'penalty' was tied to any disciplinary action. The PSSRB commented in its *Second Annual Report*, 1968–69, p. 72, that such action was, perhaps, inevitable as part of the 'learning process'. The following are some examples of such grievances:

- Alleged inequities or discrepancies in classification or reclassification on conversion to a new pay scale: *Segodnia and Kunder* (1968) PSSR Reports M 118; *Beaulieu* (1967) PSSR Reports M 141; *Greenwood* (1968) PSSR Reports M 287; *Frizzell* (1970) PSSR Reports M 1144; *Winters* (1970) PSSR Reports M 1654; *Roy* (1974) PSSR Reports M 3361; *Parama* (1976) PSSR Reports M 4342; *Frizzell* (1976) PSSR Reports M 4433; *Dorcas et al.* (1980) Adjudication files 166−2−3451to 166−2−3454
- Denial of promotion or increment: *Kosidoy* (1968) PSSR Reports M 124; *Guertin* (1968) PSSR Reports M 146
- Refusal of a special holiday: *Kennedy & Foster* (1968) PSSR Reports M 116 (The Chief Adjudicator, in dismissing the grievance, said that the refusal was not disciplinary and was not confined to the aggrieved employees, but that the employer's practice in this regard pertained uniformly to all employees in the public service.)
- Alleged improper treatment with respect to sick leave or special leave: *Vézina* (1968) PSSR Reports M 295 and M 333; *Richmond* (1980) Adjudication file 166−2−6909
- Alleged unfair application or interpretation of *Public Service Terms and Conditions of Employment Regulations*: *McMullen* (1968) PSSR Reports M 219; *Large* (1968) PSSR Reports M 337
- Alleged discrimination in competitions conducted by the Public Service Commission requiring a language qualification and thus depriving employee of promotion: *Noble* (1968) PSSR Reports M 141.

116. (1975) PSSR Reports M 4102 at M 4108. The Adjudicator had stated in his decision that he could not accept a submission by counsel for the aggrieved employee, who suggested that there must have been some finding of fault in connection with the shortage, even though not articulated.

117. (1978) 2 F.C. 11.

118. *Ibid.*, at 12−13.

119. (1980) 1 F. C. 833 at 840.

120. *Ibid.*, at 840−41.

121. (1981) 1 F. C. 181 at 188.

122. (1939) 5 Labour Arbitration Cases 1939 at 1942. Thurlow C.J. said that the distinction appears to be implicit in the reasoning of the Court in the *Grégoire Case*.

123. (1980) Adjudication file 166−2−5394.

124. *Attorney General of Canada* v. *Roine and Public Service Staff Relations Board and Robb* (1980) 2 F. C. 155 at 158.

125. (1973) PSSR Reports M 2938.

126. *Ibid.* at M 2986. See also *Atkin* (1974) PSSR Reports M 2181. In *Liske* (1981) Adjudication files 166−2−8153 and 166−2−8405 to

166–2–8408, Deputy Chairman Kates said: "What seems to be relevant in assessing whether an employee is involved in an apparent conflict of interest is not so much what actually happened but what might have happened if the impugned activity was not proscribed."

127. At M 2996–M 2997. See also *Lafrançois* (1977) Adjudication file 166–2–3164.
128. *McKendry* (note 125, above), at M 3015.
129. (1980) Adjudication file 166–2–8773. See this case for a review of decisions on conflict of interest.
130. (1975) PSSR Reports M 3959 at M 3992, approved by the PSSRB in the *Stewart Case* (1976) PSSRB file 168–2–108.
131. (1971) PSSR Reports M 2414.
132. (1979) Adjudication files 166–2–5354 and 166–2–5355.
133. (1980) Adjudication file 166–2–8889.
134. S.C. 1976–77, c. 33.
135. *Stewart* (note 130, above) at M 4001.
136. (1978) 1 F. C. 133 at 136.
137. (1982) Adjudication files 166–2–12721 to 166–2–12723.
138. See *Stewart* (note 130, above) at M 3995, approved by the PSSRB in the *Stewart Case* (note 130, above). An application to the Federal Court of Appeal was dismissed: *Stewart* v. *Public Service Staff Relations Board* (1978) 1 F.C. 133.

    See also *Vaillancourt et al.* (1973) PSSR Reports M 2876; *Vachon* (1977) Adjudication file 166–2–3016; *Chedore* (1980) Adjudication file 166–2–9320.
139. INS-A-20.
140. See note 138, above.
141. See *Stewart*, note 130, above, at M 3995 and M 4002.
142. (1977) Adjudication files 166–2–2914 and 166–2–2915. Followed in *Mezwak* (1977) Adjudication file 166–2–3072. See also *Vachon* (1977) Adjudication file 166–2–3106, affirmed by the Federal Court of Appeal (1981) 129 D.L.R. (3d) 460. Leave to appeal to the Supreme Court of Canada was denied: (1982) 141 D.L.R. (3d) 768. For further discussion of *Vachon*, see note 154, below.
143. See note 137, above.
144. (1982) 142 D.L.R. (3d) 708.
145. See *Stewart* v. *Public Service Staff Relations Board* (1978) 1 F.C. 135–36.
146. At M 3999, approved by the PSSRB in the *Stewart Case* (1976) PSSRB file 168–2–108. The Board commented that it "did not

deem it necessary in this instance to express any opinion as to what principle should be applied to an employee on leave of absence engaged in full time activity on behalf of an employee organization." See also *Vaillancourt* (note 138, above) at M 2883.

147. (1967) PSSR Reports M 1 at M 14. Donald J. Brown and David M. Beatty, *Canadian Labour Arbitration* (Agincourt, Ont.: Canada Law Books, 1977), pp. 385–86, summarize the principle applicable under the general labour-relations legislation as follows:

> ...arbitrators have uniformly accepted the rationale for and legitimacy of the probationary status as a period of time during which the employer is free to assess the full potential and capability of both a new employee and an employee who has not worked for him for some period of time in the particular context of his own work environment. . . . From [the] general premise underlying the purpose of the probationary status, it follows, at least on the issue of termination of employment, that unless the collective agreement provides otherwise, different tests and standards must be applied to probationary employees than those which are invoked in determining the propriety of the discharge of a seniority rated employee.

148. But see Chapter 7, pp. 320–21, above, for a provision in a National Film Board agreement.

149. See, for example, *Gallant* (1969) PSSR Reports M 605. The aggrieved employee had served satisfactorily in the public service, in one capacity or another, for about sixteen years. She was promoted to a new position, but was rejected during her probationary period in that position. Her name was placed on an eligibility list, and efforts were made to find a suitable position for her, but without success. Although the Chief Adjudicator expressed concern about the treatment accorded the employee, he found, nevertheless, that there was no evidence of disciplinary action resulting in discharge and held that the grievance was not adjudicable.

150. See *Caron* (note 147, above), at M 13–M 14.

151. By Adjudicator K.E. Norman in *Smith* (1977) Adjudication file 166–2–3017.

152. (1978) Adjudication file 166–2–3050.

153. *Jacmain* v. *Attorney General of Canada and the Public Service Staff Relations Board* (1978) 2 S.C.R. 15.

154. In *Richard* v. *Public Service Staff Relations Board* (1978) 2 F. C. 344, Heald J. of the Federal Court of Appeal (in a judgment endorsed by Urie and Ryan JJ.) said (at 347):

> ...an adjudicator fails to exercise his jurisdiction if he does not first inquire into the genuine nature of the employer's action in

> purporting to reject a probationary employee and . . . the adjudicator is not bound by the employer's characterization of his own actions. In the circumstances of this case, . . . it was incumbent on the Adjudicator to consider the facts objectively and in order to do this, it was necessary for him to have sufficient evidence adduced to enable him to answer the question as to whether the purported rejection on probation was in fact disciplinary action . . . so as to clothe him with jurisdiction. . . .

In *Jacmain* (note 153, above), de Grandpré J., with the concurrence of Martland, Judson and Ritchie JJ., found on the merits that the case was not one of disciplinary action and commented that he did not have "to decide whether the adjudicator has jurisdiction when the rejection is clearly a disciplinary action. . . . The question remains open" (at 38). Pigeon J., in a decision concurred in by Beetz J., agreed that the rejection on probation in this instance was warranted. On the other hand, he expressed the view that "on a grievance being filed, the Adjudicator had jurisdiction to inquire whether the rejection was in fact a dismissal as alleged by the grievor"; but he added (at 42):

> In the present case, the Adjudicator found that there were grounds for deciding that the employee was unsuitable. . . . On the basis on which the Adjudicator proceeded in the instant case, he would review every rejection because he would hold it to be disciplinary whenever in his opinion there was insufficient cause. Just as I cannot agree that the employer can deprive an employee of the benefit of the grievance procedure by labelling a disciplinary discharge a rejection, I cannot agree that an adjudicator may proceed to revise a rejection on the basis that if he does not consider it adequately motivated, it must be found a disciplinary discharge.

Dickson J., dissenting from the majority, in a decision concurred in by the Chief Justice and by Spence J., said (at 25 and 33):

> As usual, substance, and not form, governs. The form of the notice cannot deprive an adjudicator of jurisdiction if, on all the facts, the action taken by the employer is truly disciplinary in nature.
>
> ...it does not inexorably follow that, simply because there lurked in the background some cause which might justify rejection, the termination must, of necessity, be rejection and not disciplinary discharge.

In his opinion, Dickson J. said that the adjudicator was correct in classifying what occurred as a discharge for disciplinary reasons (at 29).

In *Vachon* v. *The Queen* (1981) 129 D.L.R. (3d) 460 at 473, Le Dain J., in the Federal Court of Appeal, said:

> Given [the] varying approaches to the issue in the *Jacmain* case, I am disposed, with respect, until further indication of the Court's views, to follow the approach suggested by Dickson J. in considering whether there was jurisdictional error in the adjudicator's decision.

See also note 142, above.

155. See *Caron* (note 147, above); *Sabourin and Headley* (1971) PSSR Reports M 2057; *Fardella* (1973) PSSR Reports M 2908; *Nanayakkan* (1977) Adjudication file 166−2−2812; and *Myers* (1978) Adjudication file 166−2−3703.

156. The frustration of adjudicators in situations of this sort as the result of the diverse views expressed by the members of the Supreme Court in *Jacmain* is summarized by Adjudicator K.E. Norman in *Smith* (1977) Adjudication file 166−2−3017, as follows:

> An adjudicator's jurisdiction in the case of the terminated probationer . . . is more apparent than real. The adjudicator who takes jurisdiction . . . and who is faced with new evidence which, taken alone, might justify rejection . . . is rendered impotent. In effect, once credible evidence is tendered by the Employer to the adjudicator pointing to some cause for rejection, valid on its face, the discharge hearing on the merits comes shuddering to a halt. The adjudicator, at that moment, loses any authority to order the grievor reinstated on the footing that just cause for discharge has not been established by the Employer.

One may also refer to the view of Jackett C.J. in *Re Fardella and the Queen* (1974) 2 F. C. 465 at 480:

> ...I do not wish to be taken as expressing an opinion that, where there has been, in fact, a rejection under section 5 or under section 28 of the *Public Service Employment Act*, it can be classified as a dismissal in order to create jurisdiction under section 91 of the *Public Service Staff Relations Act*. Insubordination during a probationary period might well be "cause" for rejection, either of itself or taken with other matters, just as it might be ground for disciplinary action even during a probationary period.

157. For example, *Sabourin and Headley* (note 155, above) at M 2076; *McCarthy* (1976) Adjudication file 166−2−2238; *Fortin* (1975) Adjudication file 166−2−1671.

158. For example, *Caron* (note 147, above) at M 49.

159. See note 152, above.

160. (1975) PSSR Reports M 3959 at M 3977.

161. (1981) Adjudication files 166−2−9010 to 166−2−9012 and 166−2−9030 to 166−2−9037.

162. (1979) 103 D.L.R. (3d) 193.

163. See *O'Hara* (1967) PSSR Reports M 50 at M 58; *Leduc* (1971) PSSR Reports M 1970 at M 1971.

164. See note 152, above.

165. (1970) PSSR Reports K 527.

166. The Deputy Chairman commented that few probationers have succeeded in doing so.

167. *Per* P. Meyer, Adjudicator, in *Fisher* (1971) PSSR Reports M 1909 at M 1927−M 1928.

168. For example, illness.

169. For example, as may be provided for in a collective agreement between the employer and the bargaining agent for the bargaining unit in which the employee is included. This provision of the Public Service Employment Act also applies to leave of absence granted to an employee, under subsec. 32(3) of the Act, to be a candidate for election to certain offices.

170. (1969) PSSR Reports M 524. In *Dancey* (1976) PSSR Reports M 4384, E.B. Jolliffe, Deputy Chairman, suggested that the adjudicator in *Klingbell* had "declined to accept jurisdiction, because it did not appear to be a disciplinary case."

171. *Jacmain* (notes 153 and 154, above). See, also, a decision of the Federal Court of Appeal in that case: (1977) 1 F. C. 91; and *Fardella* (notes 155 and 156, above).

172. (1976) PSSR Reports M 4426 at M 4432. See, also, *Crewe* (1970) PSSR Reports M 1480; *Dancey* (note 170, above); *Morin* (1977) PSSR Reports M 4519; *Lee* (1977) Adjudication file 166−2−2637; *St. Jacques* (1977) Adjudication file 166−2−3165; and *Ainbinder* (1978) Adjudication file 166−2−4844. In *St. Jacques* and in *Dancey*, the issue was whether the absence of the aggrieved employee could be found to be "authorized or provided for by or under the authority of any Act of Parliament". This issue turned on the interpretation or application to the aggrieved employee of the provisions of a collective agreement relating to sick leave. Other provisions of collective agreements were considered in *Gloin* (1978) Adjudication files 166−2−2990 to 166−2−2294, and in *Goodale* (note 152, above).

173. See, for example, *Lafleur* (1976) PSSR Reports 4349; *Jackson* (1979) Adjudication file 166−2−5885; *Knight* (1979) Adjudication file 166−2−6488.

174. (1977) Adjudication file 166−2−2462.

175. See *Olivieri* (1980) Adjudication file 166–2–7886.

176. (1977) Adjudication file 166–2–2834.

177. (1980) Adjudication file 166–2–9157.

178. For example, *Piché et al.* (1968) PSSR Reports M 193; *Hamilton* (1969) PSSR Reports M 345 and M 350.

179. (1969) PSSR Reports M 450 at M 461.

180. See pp. 571–72, above.

181. At M 459.

182. (1977) Adjudication file 166–2–2462. In *Lafleur* (1971) PSSR Reports M 1988 at M 1991, the Chief Adjudicator seems to treat *Bower* as supporting the position taken in *Piché* (note 178, above).

183. Known in some circles as the 'Howlett-Meltzer Controversy'. See Robert G. Howlett, "The Arbitrator, the NLRB, and the Courts" in *Proceedings of the Twentieth Annual Meeting, National Academy of Arbitrators* (Washington, D.C.: The Bureau of National Affairs, 1968): 67 ff.; Bernard D. Meltzer, "Ruminations about Ideology, Law, and Labor Arbitration", *ibid.*: 1. See also Richard Mittenthal, "The Role of Law in Arbitration" in *Proceedings of the Twenty-First Annual Meeting, National Academy of Arbitrators* (Washington, D.C.: The Bureau of National Affairs, 1969): 42 ff.; and the "Rejoinders" of Meltzer and Howlett, *ibid.*: 58 ff.

184. See Chapter 4, above.

185. (1978) Adjudication files 166–2–2990 to 166–2–2994.

186. (1978) 2 F. C. 307.

187. See note 152, above. See also *Ménard* (1980) Adjudication file 166–2–5943. See also *Salter et al.*, discussed above, p. 561 and note 46.

188. Up to 31 October 1981, there had been 7578 references to adjudication, alleging misinterpretation or misapplication of a provision of a collective agreement or arbitral award; there had been 3683 references complaining about disciplinary action, and 373 references under s. 98 of the PSSRA. For accounts of the disposition of these cases, see the *Thirteenth Annual Report* of the PSSRB (1979–80), p. 16 ff. The *Report* states (p. 18) that "Approximately one-half of all references are withdrawn or settled before being heard." Well in excess of 50 per cent of all grievances referred to adjudication originated in the Post Office.

189. For the purposes of these provisions, a bargaining agent is deemed to be a legal person. There does not appear to be any such liability imposed on a bargaining agent that represents an employee who is not included in a bargaining unit for which a bargaining agent has been certified. See, in this connection, subsecs. 90(3) and (4) of the PSSRA.

190. The last collective agreement between the employer and CUPW entered into under the PSSRA provided that the present practice in dealing with the arbitration of grievances (and this would include the costs of adjudication) should remain in effect until the conclusion of negotiations between the parties under a transitional provision in the Canada Post Corporation Act. The first agreement negotiated by LCUC under that Act provides for the sharing of fees and expenses of an arbitrator.

191. See pp. 563–64, above.

192. See, for example, *Public Service Alliance of Canada and Treasury Board* (the *Coles Case*) (1972) Adjudication file 169–2–12; *Public Service Alliance of Canada and Treasury Board (Re Maloughney)* (1973) PSSR Reports M 2811 at M 2814–M 2816.

193. In *Public Service Alliance of Canada and Treasury Board* (1977) Adjudication files 169–2–165 and 169–2–166, Adjudicator Lorne O. Clarke appeared to suggest that he lacked authority to do more than make a declaratory judgment. On an application for review under s. 28 of the Federal Court Act, *Re Public Service Alliance of Canada et al. and Public Service Staff Relations Board et al.* (1978) A–802–77 (unreported), the Court held that the authority of an adjudicator in "references under section 98 [of the PSSRA] goes beyond merely making a declaration and that it has the authority to direct what action, if any, it considers ought to be taken . . . to implement or to give effect to its decision."

194. *Professional Institute of the Public Service of Canada and Treasury Board*, (1970) PSSR Reports M 1506 at M 1539.

195. *Council of Postal Unions and Treasury Board* (1969) PSSR Reports M 389 at M 428–M 429; *Professional Institute of the Public Service of Canada and Treasury Board* (1971) PSSR Reports M 1869 at M 1870; *International Brotherhood of Electrical Workers, Local 2228 and Treasury Board* (1971) PSSR Reports M 2245, especially at M 2252; *Professional Institute of the Public Service of Canada and Treasury Board* (1975) PSSR Reports M 3793.

196. *International Brotherhood of Electrical Workers, Local 2228, and Treasury Board* (note 195 above) at M 2253; *Public Service Alliance of Canada and Northern Canada Power Commission* (1971) PSSR Reports M 2255 at M 2264.

197. *Public Service Alliance of Canada (In re Estate of T.R. Gordon) and the Treasury Board* (1970) PSSR Reports M 1549, involved the entitlement of the estate of a deceased person to a severance-pay credit under the terms of a collective agreement. No objection was taken by the employer to the adjudicability of the reference. See also note 6, above.

198. *Public Service Alliance of Canada and Treasury Board (re Maloughney)* (1973) PSSR Reports M 2811, concerned the entitlement of a

person who had been laid off, before a new collective agreement had been entered into, to retroactive remuneration under the provisions of the new agreement. The Chief Adjudicator said in part (at M 2814):

> For the purposes of the case before me now, the nature of the obligation alleged may be very simply stated. The Employer agreed *with the Bargaining Agent* that it would pay to the employees in the [bargaining unit] "for services rendered" in accordance with [certain provisions set out in the agreement]. That is an obligation of the Employer to the Bargaining Agent but it is one which can be implemented only by payment to the individual employees in the bargaining unit. It does not fail to be an obligation of Treasury Board to the Alliance merely because it can be observed or carried out only by way of payment to individuals.

The Chief Adjudicator held that there was an obligation on the employer to pay retroactive remuneration to Maloughney, and that it should be remedied by paying him the appropriate amount. Upheld by the PSSRB (1973) PSSRB file 168–2–47. See also the *Coles Case* (note 192, above) upheld by the PSSRB (1975) PSSRB file 168–2–21.

12: *Prohibitions, Remedies and Redress for Non-Observance of the Provisions of the PSSRA*

Interference with Freedom of Organization

As with practically all[1] labour-relations legislation in Canada, the Public Service Staff Relations Act (PSSRA) contains a declaration affirming the entitlement of employees to become members of employee organizations, as well as a code of prohibitions, commonly called 'unfair practices', that may interfere with such entitlement. Sections 6, 8, 9 and 10 of the Act read as follows:

> 6. Every employee may be a member of an employee organization and may participate in the lawful activities of the employee organization of which he is a member.[2]
>
> . . .
>
> 8.(1) No person who is employed in a managerial or confidential capacity,[3] whether or not he is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization.
>
> (2) No person shall
>
> (*a*) refuse to employ or continue to employ any person, or otherwise discriminate against any person in regard to employment or any term or condition of employment

because the person is a member of an employee organization or was or is exercising any right under this Act;

(*b*) impose any condition on an appointment or in a contract of employment or propose the imposition of any condition on an appointment or in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Act; or

(*c*) seek by intimidation, by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee

(i) to become, refrain from becoming or cease to be, or

(ii) except as otherwise provided in a collective agreement, to continue to be,[4] a member of an employee organization, or to refrain from exercising any other right under this Act;

but no person shall be deemed to have contravened this subsection by reason of any act or thing done or omitted in relation to a person employed, or proposed to be employed, in a managerial or confidential capacity.

9.(1) Except in accordance with this Act or any regulation, collective agreement or arbitral award, no person employed in a managerial or confidential capacity, whether or not he acts on behalf of the employer, shall discriminate against an employee organization.

(2) Nothing in subsection (1) shall be construed to prevent a person employed in a managerial or confidential capacity from receiving representations from, or holding discussions with, the representatives of any employee organization.

10. Except with the consent of the employer, no officer or representative of an employee organization shall attempt, on the employer's premises during the working hours of an employee, to persuade the employee to become or refrain from becoming or to continue to be or to cease to be a member of an employee organization.

Allegations of Interference by Management

In the administration of the general labour-relations legislation in Canada, many allegations concerning infringement by management of similar 'unfair practices' provisions surface during the progress of an organizational campaign by a trade union or at the certification stage. The allegation is usually related to purported activity by, or with the connivance of, the employer, to forestall or defeat an application for certification. There has been only one instance in which a *complaint* was filed with the

PSSRB, alleging improper action of this sort by representatives of the employer. In *Doherty* v. *Staff of the Non-Public Funds, Canadian Forces, et al.*, the Board found that the employer had participated actively in the formation of an employer-dominated employee organization. In the course of its decision,[5] the Board said:

> ...the Board recognizes that management undoubtedly acted in good faith. However, the good or the bad faith of the parties is not relevant in this kind of case.
>
> We also wish to add by way of comment that the employer was in no way obliged to actively protect the interests of a union merely because it was informed of the organization of the said union.

As we have seen[6], section 39 (1) of the PSSRA prohibits the PSSRB certifying as a bargaining agent "any employee organization in the formation or administration of which there has been or is, in the opinion of the Board, participation by the employer or any person acting on behalf of the employer of such a nature as to impair its fitness to represent the interests of employees in the bargaining unit." As we have also seen,[7] in the only instance in which an allegation was made that fell within this provision, the allegation was withdrawn by the intervening employee organization.

Over the years there have been relatively few complaints under the PSSRA that management has interfered with the administration of an employee organization or the representation of employees by such an organization, or that anyone has discriminated against a person in regard to employment because of that person's membership in an employee organization or because he was exercising any right under the Act. Indeed, very few complaints of this nature have been found by the PSSRB to be grounded in fact.[8] In the *Gennings Case*,[9] the complainant, who had been transferred from one position to another, complained that she had been discriminated against because she engaged in union activities during working hours. In dismissing the complaint, the Board said:

> [Subsection 8(2)] was never designed to confer upon an employee license to engage in what may broadly be described as union activities during working hours, except to the extent that the engaging in such activities or any of them is sanctioned by the provisions of a collective agreement. Nor can it be said that an employer is required, again except as may be stipulated in a collective agreement, to provide to an employee an opportunity to engage in union activities. We reserve for future consideration, if

> the occasion arises, the question as to whether there may be an infringement of s. 8(2) in circumstances where an officer of an employee organization is transferred from one shift to another or has his hours of work altered, if it can be shown that the predominant purpose of the transfer or alteration was to make it difficult or impossible for him to carry out the duties of his union office.

On the other hand, in *Stonehouse* v. *Treasury Board et al.*,[10] the PSSRB said:

> The crucial issue . . . is whether the denial to an employee of an appointment to a Unit Head position for reasons including the time spent in the performance of Union responsibilities constitutes discrimination prohibited by sec. 8(2) in this case.
>
> . . .
>
> ...The Board cannot ignore the admission that time spent in the performance of her union responsibilities "very definitely affected the decision not to involve you in supervision at this time".
>
> In this case there is a conflict between the right to participate in union activity under the [PSSRA] and the need to perform the duties of a department. This issue is very difficult to resolve but must be faced. The Board believes that management in this instance very naturally considered the work of the department not only to be paramount but gave insufficient consideration to the exercise of rights by an employee without fear of discrimination. It was probably not wilful nor deliberate discrimination but rather concern for the standard of the work of the department. However, the Act prohibits discrimination whether it is done knowingly or wilfully or neither.

The Board ordered two of the respondents to observe the prohibition and instructed that the complainant be offered restoration to her former position at the first opportunity, but subject to her preparedness to give a commitment that she would limit her involvement in union activities during working hours to ensure that her responsibility to departmental work would be given the priority acceptable to management.

In *Thompson* v. *Treasury Board*,[11] management asked the complainant, in the course of an interview relating to transfer to another position, whether he foresaw any problem of conflict of interest in the new position (which involved supervisory duties) because of his membership in the employee organization which was the bargaining agent. The complainant testified that the question embarrassed him and caused him concern as to whether his answer would affect his job. The PSSRB said:

> We have no reason to disagree with this statement. However, in light of the vagaries of human nature, the test as to the propriety of such a question within the context of the [PSSRA] should not, in our view, be determined solely on the subjective assessment of the Complainant. Rather the question must be determined on an objective assessment, taking into account the circumstances of the particular situation.
>
> The Board notes that the question posed was a delicate one but this does not constitute in itself a violation of the Act. There is no evidence or inference of animosity directed towards the bargaining agent or anyone exercising a right under the Act. Furthermore . . . all candidates were assumed to be members of the bargaining agent and the purpose of the question was two-fold: first, to ensure that each candidate was aware that the position was one within the bargaining unit, and second, to assess whether the candidate exhibited a strong anti-management or strong anti-union attitude, neither of which would be acceptable.

The Board held that it was relevant to seek and determine the reactions of each candidate in this regard, but cautioned that under different circumstances, such a question could have different results.

In recent years, a number of complaints have been made by persons who had not obtained satisfactory resolution to their grievances, and who sought to have the Board find that the actions of the employer constituted an infringement of the 'unfair practices' provisions of the PSSRA. In some instances the grievances were such that they could be, or were, referred to adjudication; in others they were not so referable.[12] Subsection 95(3) of the Act provides that:

> Where . . .
>
> (b) the grievance is not one that under section 91 may be referred to adjudication,
>
> the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken thereon.

Consequently, the PSSRB has held that where such a grievance had been denied at the final level, the employee could not be permitted to do indirectly what he could not do directly: in other words, he could not seek relief by way of a *complaint* alleging an unfair practice under the Act regarding the action that formed the substance of his grievance.[13] On the other hand, where the grievance has not been processed to the final level at the time the complaint is filed, subsection 95(3) of the Act does not operate to bar such a complaint.[14] Nor does it do so where the complaint relates to actions not dealt with in the grievance,[15] or where "the essential purpose of the complaint is to have the Board deal with the allegation that the respondents had failed to observe the prohibitions contained in sections 8, 9 and 10 of the Act, in that their actions had been biased by their attitudes towards the incumbent bargaining agent and towards the incumbent as an active supporter of the bargaining agent."[16]

A number of complaints that came before the PSSRB, while alleging a violation of the 'unfair practices' provisions here under consideration, in reality sought rulings from the Board on whether certain actions taken officially by management were 'legitimate'. The *Government Policy on Rights of Managers Case No. 1*[17] turned on the right of the employer to issue a document entitled "Statement of Government Policy on Obligations of Public Servants Identified as Persons Employed in a Managerial or Confidential Capacity". The statement was distributed to all public servants who had been 'identified' by the employer as persons employed in a managerial or confidential capacity, irrespective of whether or not they had been designated by the Board in the manner provided for in the PSSRA.[18] The statement informed persons so identified that they should refrain from any association with any employee organization that would be contrary to law or that would create for them a conflict of interest, and warned that they would be held accountable for failure to do so. One senior officer of a government agency, in distributing the statement, enclosed a memorandum adding his personal observation that if a person so identified held membership in an employee organization, he must terminate it at once; the memorandum was subsequently disavowed by his superiors. The Board held that the distribution of the statement would be an offence under subparagraph 8(2)(*c*)(i) of the PSSRA only if it were directed to *employees*, but that it would not be an offence if it were directed to persons who were not employees within the meaning of that term as defined in the Act, that is, persons employed in a managerial or confidential capacity.[19] Thus it would clearly not be an offence in the case of persons who had been 'designated' by the Board. Concerning persons who had not yet been designated, the Board said:[20]

> If we were to interpret the phrase "person employed in a managerial or confidential capacity" in section 8 [of the PSSRA] as being confined to the persons coming within heads (i) and (ii) [of the definition] of s. 2 . . . and to the persons that have been

> specifically designated by the Board under s. 2 . . . of the Act, we would be conferring a licence upon high ranking public servants who have not been so designated to interfere without let or hindrance with the freedom of employees to form and be represented by the employee organization of their own choice and to discriminate against any employee organization that does not meet with their approval.[21]
>
> ...It is our considered opinion, having regard to the mischief that sections 8 and 9 were designed to cure, that the phrase "person employed in a managerial or confidential capacity" in sections 8 and 9 must be taken to denote all persons who occupy the positions or exercise the duties and functions spelled out in [the several heads] of s. 2..., irrespective of whether they have or have not been designated in accordance with the process set out in that [section].

The Board also held that it was "bound to interpret the term 'a person' in s. 8(2)(a) of the . . . Act so as to exclude from the protection of that provision persons employed in a managerial or confidential capacity."[22] It added that it was fortified in this conclusion by the wording of the last few lines of subsection 8(2), the saving clause that excludes from the subsection acts or things done or omitted in relation to a person employed, or proposed for employment, in a managerial or confidential capacity.[23]

As we noted in Chapter 2, above, the PSSRB at first expressed the opinion in the *Foreign Affairs Case No 1*[24] that if the employer abused its authority under subsection 99(4) of the PSSRA[25] by designating an excessive number of grievance officers, a remedy would be available. We also noted that bargaining agents have not met with any measure of success in invoking for this purpose the 'unfair practices' provisions of the Act.[26] In a preliminary decision in *Public Service Alliance of Canada* v. *Her Majesty in right of Canada as represented by Treasury Board and J.P. Connell et al.*,[27] when the PSSRB's jurisdiction to entertain a complaint of this nature was challenged, the Board held that it did have jurisdiction in the matter. Subsequently, after a hearing on the merits,[28] the Board held that "the complainant's efforts to seek a remedy [by alleging that there had been violation of the 'unfair practices' provisions] were misconceived." The complainant's challenge to the employer's proposals for the designation of a large number of persons had already been put in issue in collateral proceedings. The Board, in the complaint case, pointed out that the status of the employees concerned in that proceeding remained unchanged until the Board arrived at a decision. It therefore went on to say:[29]

> Accordingly, since no designations can be said to have been effected at law by the employer, it cannot be concluded that the employer has exercised in any legal sense its authority in compliance with subsection 99(4) of the [PSSRA]. As a result, the allegation charging that the employer has abused its authority has for the time being been stayed or neutralized until the collateral proceedings have been exhausted. Or, more precisely, to a great extent these challenges reflect the bargaining agent's efforts to call upon the employer to explain the necessity for its proposals. Accordingly, it is quite premature at this stage to make a finding of abuse that is intended to be characterized by us as an unfair labour practice where the employees affected continue for all practical purposes to be "represented" for collective bargaining purposes by the complainant bargaining agent.

As an additional reason for dismissing the complaint, the Board relied on its earlier decision in the *Government Policy on Rights of Managers Case No. 1*, concerning the effect of the concluding words of subsection 8(2) of the Act.[30]

In *Professional Institute of the Public Service of Canada et al.* v. *McWhinney et al.*,[31] the complainants alleged that there had been a violation of sections 6, 8 and 9 of the PSSRA through management's dissemination of misleading statements relating to legislation then before Parliament. The PSSRB held that the dissemination of statements of this nature did not constitute an offence under the Act, even if the statements were false or inaccurate. The Board commented that it was not a referee in assessing the statements of the parties. In *Simard and Manion* v. *Treasury Board*,[32] the officers of a bargaining agent complained that the employer had violated sections 8, 9 and 10 of the Act by prohibiting representatives of the bargaining agent from distributing union literature on the employer's premises during employees' free time unless the documents were first submitted to management for clearance. The applicable collective agreement provided for access to space on bulletin boards on the employer's premises, subject to the employer's prior approval of material to be posted. Vice-Chairman J.M. Cantin held that if union literature could not be posted on bulletin boards without such approval, the same rule applied to the direct distribution of literature to employees on the same premises.

The nature of the proof required to support a finding that there has been an infringement of the provisions of the PSSRA has been the subject of comment in several cases. With respect to subsection 8(1) of the Act, the PSSRB expressed the view in *Public Service Alliance of Canada* v. *Her Majesty the Queen in right of*

Canada as represented by Treasury Board and Connell et al.,[33] that in such a situation, the Board must be satisfied of a perverse intent on the employer's part to undermine and defeat the purposes of the Act.[34] In addition, as far as subsections 8(1) and 9(1) of the Act are concerned, it must be shown that the persons whose conduct is complained of are persons employed in a managerial or confidential capacity; this qualification does not apply to subsection 8(2), which is applicable to a *person*. In *Economists', Sociologists' and Statisticians' Association* v. *Her Majesty the Queen in right of Canada as represented by the Treasury Board*,[35] the PSSRB held that Her Majesty was not a 'person' within the meaning of section 8 of the Act, and the Board had "no jurisdiction to inquire into and make a determination on a complaint made pursuant to paragraph 20(1)(a) of the Act in which 'Her Majesty in right of Canada as represented by the Treasury Board' is named as the respondent." In *Schmidt* v. *Lang and Chrétien*[36] two Ministers of the Crown were named as respondents. The PSSRB, in dismissing the complaint, held that "a Minister of the Crown does not fall within the purview of those persons against whom the prohibitions contained in subsections 8(1) and 9(1) apply."

In a number of cases involving infringement of sections 8 and 9, the Treasury Board itself was named as respondent. In some instances, counsel for the employer objected; in others, no objection was taken. It is obvious that the Treasury Board is not a 'person' within the meaning of the relevant sections. In *Steer* v. *Treasury Board*[37] the complainant named the Treasury Board as respondent but, in the body of the complaint, he named an individual. In an *obiter dictum*, the PSSRB said it would be difficult to dismiss a complaint in these circumstances, "particularly where a person acting for the employer is identified as the individual whose actions or words constituted an alleged violation of the Act."[38] In the *Horenblas Case*[39] the Board dismissed a complaint alleging that the Public Service Commission and the chairman of an appeal board acting under section 31 of the Public Service Employment Act had contravened section 8 of the PSSRA in dealing with a recommendation for the release of the complainant for incompetence. The Board held that neither the Commission nor the chairman of the appeal board, entities independent of the employer, could be said to be 'persons acting on behalf of the employer'.

In *Schmidt* v. *Lang and Chrétien*,[40] the complainant, acting on his own behalf, alleged that the respondents had violated subsections 8(1) and 9(1), in that their actions in giving recognition to *l'Association des gens de l'air du Québec*, on matters pertaining to the welfare of the air-traffic-control group, had a detrimental affect on the Canadian Air Traffic Control Association, the certified bargaining agent for the group. In dismissing the complaint on other grounds, the PSSRB commented that the allegations did not indicate that *per se* the actions complained of had any direct consequences for the complainant. The respondents' actions in this case were also sanctioned by subsection 9(2) of the PSSRA. Although the intent of that provision was probably to permit management to discuss matters with an employee organization that had not been certified, it also permits management personnel to hold discussions with an employee organization other than the certified bargaining agent for a bargaining unit, concerning matters that affect the bargaining agent or the employees in the bargaining unit.[41] The provision may appear to a bargaining agent or to employees in a bargaining unit, as it did in the case discussed above, whether justifiably or unjustifiably, as an attempt by management to undermine the position of the bargaining agent.

Concerning subsection 8(2), the PSSRB held in the *Gennings Case*[42] that:

> In order to succeed..., the Complainant must show (i) that she was discriminated against in regard to employment or any term or condition of employment, (ii) because she was a member of an employee organization or was exercising any right under the Act,[43] and (iii) that she was subjected to such discrimination by the person named in the complaint as the respondent.

Allegations of Interference by Bargaining Agents

Over the years there have been a few instances in which complainants have alleged that a bargaining agent has failed to observe section 6 or has violated the prohibitions set out in section 8 of the PSSRA. In two cases the structure and operation of a bargaining agent were attacked. In the *Campbell Case*[44] the applicant alleged, among other complaints, that the constitution of the Public Service Alliance of Canada had violated section 6 of the Act in that the provisions in the constitution for the election of delegates to the annual convention of the Alliance were undemocratic. The PSSRB, in dismissing the application, held[45] that in order to succeed, the applicant must show that the Alliance had interfered with his freedom as declared in section 6 of the Act. The applicant also complained about a resolution adopted at a convention of the component of the Alliance to which the applicant belonged. This resolution instructed delegates of the component, who were to attend the Alliance's convention, about the way in which they were to vote on a certain matter at the convention; it also stated that delegates who could not support the position of the component were to abstain from talking or voting, on pain of having their credentials withdrawn. The Board held that the resolution did not constitute a threat in violation of section 8 of the Act.

In the *Hibbard Case*[46] the applicant complained about the failure of the Alliance to cause branches to hold regular meetings and elect officers. He contended that according to section 6 of the PSSRA, by necessary implication, his entitlement to be a member of the Alliance and to participate in its lawful activities included an obligation upon the officers of the Alliance to ensure that the local was active and functioning as required by the constitution of the Alliance. The PSSRB held:

> The language of section 8(2)(c)(i) [of the PSSRA] is confined to the rights of an *employee* and does not involve the rights of a *member* vis-à-vis an employee organization. In the circumstances of this complaint, the Board has no authority to intervene in the internal affairs of an employee organization.
>
> ...The rights of members are matters between a member and the employee organization and are governed by the constitution and by-laws of that organization. The complaints . . . against the Officers of the organization are an internal matter of [the Alliance], for which there may be a remedy in another forum.[47]

Another complaint of a somewhat related nature, in *Patenaude* v. *Canadian Air Traffic Control Association*,[48] was based on the refusal of the bargaining agent to execute the French version of a collective agreement, although it did execute the English version. The complainant alleged that the failure to execute the French version of the agreement violated paragraphs 8(2)(*a*) and 8(2)(*b*) of the PSSRA in that it imposed a condition on an appointment or in a contract of employment and also discriminated against the complainant in his exercise of a right under the Act. The PSSRB found that there was no evidence to support the claim that the position taken by the respondent constituted the imposing of a condition on an appointment or in a contract of employment. On the issue of discrimination, the cardinal point of the complainant's case was that:

> ...he might be prejudicially affected (i) in that, because of his inability to understand and appreciate fully the terms of the collective agreement in the language in which it was executed, he might not be aware of all his rights under the agreement, and (ii) because, although a grievance itself might be presented in French, it would have to be based on the English text as the only official version of the collective agreement. The latter situation might create difficulties for an employee whose language was French in that, if there was any ambiguity in the English text, an employee would not be able to rely on an official French text as an aid in the construction of the ambiguous language.

The PSSRB held, in dismissing the complaint, that there was no statutory requirement that a bargaining agent execute a collective agreement in both official languages,[49] and that any prejudice to the complainant because of ambiguous language in the English text could be resolved through extraneous evidence relating to the intent of the parties; since the negotiations had been conducted in English, such evidence would not be different even if an official French version were available. The complainant also objected to the support given by the bargaining agent to grievances "against the identification of bilingual positions". In this connection the Board said:

> There is nothing in the Public Service Staff Relations Act or in the Official Languages Act that would bar a bargaining agent from making known its opposition to the identification of certain positions as being bilingual. Nor is there anything in these statutes that would bar a bargaining agent from supporting the "grievance" of an employee who feels himself aggrieved by a determination that the position he occupies at a material time is to be identified as a bilingual position or, for that matter, as a unilingual position other than the one in which he is qualified. If it were shown that the bargaining agent adopted a discriminatory approach in its dealing with the grievances of employees because of the language fluency of the aggrieved employee, a different situation might arise.[50]

Have bargaining agents a duty of fair representation?

In several instances the PSSRB has been called upon to consider complaints concerning the failure of a bargaining agent to support a grievance of an employee that related to the interpretation or the application of a collective agreement to that employee. In *Casement and Ross* v. *Treasury Board, McPherson and Goff*,[51] the complainants alleged that the officers of a bargaining agent had refused to process grievances for the complainants who were not *members* of the bargaining agent. The PSSRB dismissed the complaints because there was no evidence to support the allegations. Nevertheless, the PSSRB felt called upon to make some observations concerning a preliminary objection raised by the representatives of the officers of the bargaining agent. These representatives objected that there was nothing in the PSSRA requiring a bargaining agent to give service to members of the bargaining unit who do not support their bargaining agent financially. The Board said:

> We disagree strongly with this proposition. According to the Act, the bargaining agent, once certified, is granted the exclusive right of representing the members of the bargaining unit. This exclusive right implies a corresponding obligation, i.e., the obligation to represent, and thus to give service to every one of the members of the bargaining agent,[52] irrespective of his financial contribution. The second proposition we wish to comment on involves the contention that, based on subsection 90(2) of the [PSSRA], nothing in the Act obliges a bargainng agent to process a grievance by any employee, irrespective of the employee's status vis-à-vis the bargaining agent. If, by this statement the representative of the respondents . . . means that a bargaining agent can refuse to handle a grievance on the basis that there is no valid ground to support it, he is giving a correct interpretation of the Act. The refusal to process a grievance on other grounds might entail discrimination.

In *Montreuil* v. *Canadian Union of Postal Workers*,[53] the complainant (a casual employee with more than six months continuous employment)[54] alleged that the respondent had refused to support the complainant's filing a grievance relating to a collective agreement unless the complainant became a full-time or part-time employee. Counsel for the respondent submitted that every employee organization had "an inalienable discretionary power in respect of the presentation and approval of grievances relating to the application or interpretation of a collective agreement." In rejecting this submission, the PSSRB said, "the Board must recognize the discretionary power invested in every employee organization in respect of grievances relating to the interpretation or application of collective agreements. However, one must not forget that this discretionary power is bound by the obligation to provide fair representation." In its decision, the Board held that the bargaining agent had failed in its obligation to provide fair representation to the complainant, since, contrary to paragraph 8(2)(*b*) of the Act, it had imposed a condition on an appointment or a contract of employment which had the effect of restraining the complainant from exercising his right under the PSSRA to present a grievance. The decision of the Board was set aside by the Federal Court of Appeal in *Canadian Union of Postal Workers* v. *Public Service Staff Relations Board et al.*,[55] on the ground that:

> Section 8(2)(*b*) merely prohibits the imposition "*on an appointment or in a contract of employment*" of any condition that seeks to restrain an employee from exercising a right under the [PSSRA]. Even if it were assumed that the Board was correct in saying that the complaint charged that the union had sought to impose conditions of that sort, it is impossible to argue that those conditions were imposed "in a contract of employment" or "on an appointment". Even if Mr. Montreuil's complaint is given the interpretation that the Board gives it, it cannot be contended that the complaint related to a breach of section 8(2)(*b*).

Although the complaint before the Board related to paragraph 8(2)(*b*) of the PSSRA, and the Board expressed no opinion as to the applicability to the situation of paragraph 8(2)(*c*), Montreuil appears to have submitted to the Court that there was a breach of that paragraph as well. With respect to this submission, the Court said:[56]

> Mr. Montreuil contended first of all that his complaint related to a breach of section 8(2)(*c*) because it was to be interpreted as charging the union with having sought, by refusing to approve his grievance, to induce him to waive his right to remain a casual employee. This contention must be rejected. Even if the union were guilty of such machinations, it would not have infringed section 8(2)(*c*) since Mr. Montreuil's right to remain a casual employee is not a right under the *Public Service Staff Relations Act*.
>
> Mr. Montreuil then contended that his complaint was to be interpreted as charging the union, by refusing to consider his grievance, with seeking to deprive him of the right to present a grievance. . . . According to section 90(2), the complainant had the right to present his grievance only if he had obtained the union's prior approval. The complainant's right to present a grievance was conditional; its existence depended on the union's approval. By refusing to approve the grievance, the union did not use any means to restrain the complainant from exercising a right; it simply acted as if such a right did not exist.
>
> Actually, Mr. Montreuil's charge against the union was simply that it had failed in its obligation towards the employees it was supposed to represent. Perhaps there is merit to this complaint, but it is not one that the Board had the power to examine.[57]

In the light of this decision, it cannot be said that there is a duty on bargaining agents to give fair representation to employees in the presentation of grievances under the PSSRA, but that a bargaining agent indeed has an inalienable right to refuse to approve or support a grievance of an employee.[58] However, it may be that an employee could seek relief in such circumstances by applying to the PSSRB for the revocation of the certification of the bargaining agent, under subsection 42(1) of the Act, on the ground that the bargaining agent had ceased to act in this capacity.[59]

The PSSRA does not expressly require a bargaining agent, in negotiating a collective agreement, to represent employees in a bargaining unit fairly. In the *Air Traffic Control Case No. 1*,[60] the PSSRB commented that the reconciliation of conflicting interests must be left to be worked out according to the democratic process. However, the Board indicated that if it were shown that a bargaining agent engaged in discriminatory practices, a remedy would be available.

Nature of Proof in Allegations of Interference with Freedom of Organization

In the *Gennings Case*,[61] the PSSRB had commented in passing that "a complaint under s. 8 of the [PSSRA] has quasi-criminal qualities" and that the complainant must produce substantial evidence of discrimination to succeed in such a complaint. In *Stonehouse* v. *Treasury Board et al.*,[62] the Board expressed doubts about the validity of the statement in the *Gennings Case*. After commenting that "the evidence in the Gennings Case would appear to support the conclusion to dismiss the complaint whether or not section 8 of the Act is deemed to have 'quasi-criminal qualities'," the Board went on as follows:

> ...the purpose and application of the prohibitions outlined in section 8 of the Act ought not to be considered independently of the rights of employees referred to in section 6.
>
> . . .
>
> If the rights granted to employees by section 6 are to be taken seriously,...then the prohibitions against the violation of the exercise of these rights must be zealously guarded and defended by this Board.

The Board than proceeded to treat the matter as being of a civil nature.[63]

Unlawful Strikes

The PSSRA also contains provisions prohibiting employees from engaging in strikes in certain circumstances. The term 'strike' is defined in section 2 as including "a cessation of work or a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of the employees designed to restrict or limit output". In the *Pigeon River Customs and Excise Strike Declaration Case*,[64] a number of employees resident in Thunder Bay, whose work station was at Pigeon River, reported at Thunder Bay and stated that they were available for work, but would not perform their duties at Pigeon River unless they were transported to that location at the expense of the employer. The PSSRB held that in these circumstances the employees had engaged in an unlawful strike. However, the Board went on to comment that a different result might follow where a refusal to work involved situations dangerous to the health or safety of employees. In *Treasury Board* v. *Cuillerier and Dandurand et al.*,[65] the Board held that an inference concerning whether employees were acting in concert may be drawn from the fact that there was an abnormal number of absences among a group of employees, and that there was a coincidence in such absences, even though the ostensible reason for the absences was illness.

The prohibitions against engaging in strikes are set out in section 101 of the PSSRA as follows:

> (1) No employee shall participate in a strike
>
> (*a*) who is not included in a bargaining unit for which a bargaining agent has been certified by the Board,[66]
>
> (*b*) who is included in a bargaining unit for which the process for resolution of a dispute is by referral thereof to arbitration,[67] or
>
> (*c*) who is a designated employee.
>
> (2) No employee who is not an employee described in subsection (1) shall participate in a strike
>
> (*a*) where a collective agreement applying to the bargaining unit in which he is included is in force, or
>
> (*b*) where no collective agreement applying to the bargaining unit in which he is included is in force, unless
>
> (i) a conciliation board for the investigation and conciliation of a dispute in respect of that bargaining unit has been established and seven days have elapsed from the receipt by the Chairman of the report of the conciliation board, or

> (ii) a request for the establishment of a conciliation board for the investigation and conciliation of a dispute in respect of that bargaining unit has been made in accordance with this Act and the Chairman has notified the parties pursuant to section 78 of his intention not to establish such a board.[68]

In the *Windsor Post Office Application for Consent to Institute Prosecution Case*,[69] the PSSRB held that the word 'participate' in section 101 of the PSSRA must be given a narrow meaning and must be equated with 'engaging in'. The application of the prohibition against *designated* employees participating in a strike came before the Board in the *Electronics Application for Consent to Initiate Prosecution Case No. 1*.[70] The Board held that where employees were designated under section 79 of the Act on a stand-by basis (that is, as employees who were to report for work only if called in to perform emergency duties), they had to observe the prohibition against striking only during the times that they were required to be on duty in accordance with the terms of their designations. The conclusion of the Board in this case can no longer prevail in view of the decisions of the Courts in the *Canadian Air Traffic Control Association Case* discussed in Chapter 10, above.[71]

A corresponding prohibition to that contained in section 101 of the PSSRA applies to employee organizations, their officers or representatives. Section 102 provides:

> No employee organization shall declare or authorize a strike of employees, and no officer or representative of an employee organization shall counsel or procure the declaration or authorization of a strike of employees or the participation of employees in a strike, the effect of which is or would be to involve the participation of an employee in a strike in contravention of section 101.

In the *Pigeon River Case*,[72] a senior official of a union had said that if a group of employees went on strike as they proposed, and if disciplinary action were then taken against them, the union would stand behind them. The PSSRB said that such a statement "would normally be taken by employees as an authorization by [the official's] organization of a strike if they did institute one and it must be so regarded by [the Board]." In the *Fort Erie and District Customs and Excise Strike Declaration Case*,[73] the Board said that "an employee organization may be held responsible for certain action if a majority of the members at a meeting approved of that action even though the officers of that organization and the members of the executive did not concur in the decision taken and even if the President of the organization leaves the chair." In the *Electronics Application for Consent to Initiate Prosecution Case No. 2*,[74] the Board said that "Anyone who instructs, directs, incites, advises, recommends, encourages or induces" employees to go on strike may be said to "counsel or procure".

Lock-outs

There is no countervailing provision in the PSSRA, as there is in the general labour-relations legislation, that would entitle the employer to lock out employees in the same circumstances as those in which employees may engage in, or a bargaining agent may call or authorize, a strike.[75] Although it is highly improbable that the employer in the federal public service would lock out the employees in a bargaining unit to compel them to agree to terms and conditions of employment, there have been several instances in which the employer has dispensed temporarily with the services of some employees during the course of a lawful strike. As we noted in Chapter 10, above, several complaints under subsection 20(1) of the PSSRA, which alleged infringements of section 8 of the Act in such circumstances, were dismissed. The finding on the evidence was that the purpose of the employer in taking such action was not malevolant.[76]

Processes for Dealing with Allegations of Interference with Freedoms and with Unlawful Strikes

There are two processes provided for in the PSSRA for dealing with infringement of the prohibitions in sections 8, 9 and 10: the first, by way of a complaint, and the second, by way of prosecution of an offender. Concerning the first of these forms of recourse, subsection 20(1) of the Act states:

> (1) The Board shall examine and inquire into any complaint made to it that the employer, or any person acting on its behalf, or that an employee organization or any person acting on its behalf, has failed
>
> (*a*) to observe any prohibition contained in section 8, 9 or 10;
>
> . . .
>
> (2) Where under subsection (1) the Board determines that any person has failed to observe any prohibition, . . . it may make an

> order, addressed to that person, directing him to observe the prohibition, . . . or take such action as may be required in that behalf within such specified period as the Board may consider appropriate and,
>
> (*a*) where that person has acted or purported to act on behalf of the employer, it shall direct its order as well
>
> (i) in the case of a separate employer, to the chief executive officer thereof, and
>
> (ii) in any other case, to the Secretary of the Treasury Board; and
>
> (*b*) where that person has acted or purported to act on behalf of an employee organization, it shall direct its order as well to the chief officer of that employee organization.

In case of non-compliance with such an order, section 21 of the PSSRA provides that:

> Where any order made under section 20 directs some action to be taken and is not complied with within the period specified in the order for the taking of such action, the Board shall forward to the Minister through whom it reports to Parliament a copy of its order, a report of the circumstances and all documents relevant thereto, and the copy of the order, the report and the relevant documents shall be laid by the Minister before Parliament within fifteen days after receipt thereof by him or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting.[77]

Although the PSSRA does not expressly declare that failure to observe any prohibitions contained in sections 8, 9 or 10 constitutes an offence, nor does it specify the fine applicable in such circumstances, section 106 provides that "No prosecution arising out of an alleged failure by any person to observe any prohibition contained in section 8, 9 or 10 . . . shall be instituted except with the consent of the [PSSRB]." It follows, by necessary implication, that prosecution is a process applicable in situations where these prohibitions have been violated.[78]

Prosecution is expressly provided for if unlawful strikes occur. Section 104 of the PSSRA states:

> (1) Every employee who contravenes section 101 is guilty of an offence and liable on summary conviction to a fine not exceeding one hundred dollars.
>
> (2) Every officer or representative of an employee organization who contravenes section 102 is guilty of an offence and liable on summary conviction to a fine not exceeding three hundred dollars.
>
> (3) Every employee organization that contravenes section 102 is guilty of an offence and liable on summary conviction to a fine not

> exceeding one hundred and fifty dollars for each day that any strike declared or authorized by it in contravention of that section is or continues in effect.[79]

Although the PSSRB's *Regulations and Rules of Procedure*, section 56, suggest that a hearing on an application for consent to institute a prosecution is discretionary with the Board, it has invariably followed the practice of holding a hearing.[80] However, the proceeding is not treated strictly as 'a trial on the merits'. Accordingly the Board has held[81] that "evidence submitted by the Applicant (in the form of statutory declarations, having the same force and effect as if made under oath . . . by persons who declare, on the basis of information that the respective declarants verified from records created at or about the relevant time, that the Respondents named in the declarations failed to report for work in accordance with their work schedules), and . . . the coincidence in the times when they so failed to report" had probative value and called for an explanation from the respondents. In addition, in such a proceeding, "it is not incumbent on the Board to make a definitive determination as to whether the respondents committed the offence alleged. . . . [I]t is sufficient that an applicant establish a *prima facie* case that the alleged offence has been committed."[82]

The granting of consent lies in the discretion of the PSSRB. In the *Electronics Application for Consent to Institute Prosecution Case No. 1*, the Board said:[83]

> An important consideration of the Board in an application to institute a prosecution is to determine whether, by granting its consent, it will advance the purpose and intent of the [PSSRA] and thereby promote a better understanding of employee-employer relationships between the parties. As such it would be improper for the Board to grant consent solely on the basis of a *prima facie* case, but rather [it] must make its determination after considering all the circumstances of the case.

In the case just mentioned, consent was denied with respect to certain employees on the ground that as far as these employees were concerned, the employer had not come in with 'clean hands'. The employer had failed to give effect to its own commitments, and the Board found that "the conduct of the Employer did not comply with the dictates of good employer-employee relations with the result that it aggravated . . . [the] situation".[84] Again, leave was denied where the employer had made out a *prima facie* case against an officer of an employee organization for allegedly counselling or procuring a strike, but where there was evidence that he afterwards made a determined and almost frantic effort to induce the employees to stay at or return to work; this effort was successful with a great many employees.[85]

In the *Windsor Post Office Case*, the PSSRB had expressed the opinion, in an *obiter dictum*, that "the institution of a prosecution should not be resorted to under the Public Service Staff Relations Act as a form of retribution. It should be resorted to primarily for its deterrent effect." The Board drew attention to the lengthy delay — more than three months between the date when the alleged infractions took place and the date when the application for consent was made — and the fact that the relationship between the parties had improved substantially in the meantime, and it suggested that these were grounds that should be taken into account by the Board in the exercise of its discretion.[86] Some years later, in *Treasury Board* v. *Lévesque et al.*,[87] the Board characterized this statement as an *obiter dictum* and stated that it was not obliged to follow it. It deplored the length of time taken by the employer before it made the application — again over three months — but held that the delay was not fatal because no prejudice was shown to have been caused to the respondents. Nevertheless, it commented that it was not shown in this case that the relations between the parties had improved, or to what point they had improved. In addition the Board noted that it was dealing with a case of employees who had been designated in the interests of public security and safety.

Shortly after the PSSRB's decision in the *Lévesque Case*, the Board again considered the principle of the effect of a prosecution on the relationship between the parties, and the factors to be taken into account in the exercise of its discretion. In *Treasury Board* v. *Power*[88] the employer had made an application for leave to institute a prosecution related to an unlawful strike, but the application was withdrawn while negotiations for renewal of a collective agreement were in progress. Three months later, after normalcy was established, the employer filed a new application. In dismissing the new application, the Board said:

> Whether the decision to withdraw the first application had an impact on the future conduct of the parties in their negotiations is not, in our view, relevant. What is significant is that the intention

> of the employer was to influence the path the negotiations were to follow.
>
> ...What the employer has simply done is to implicate the Board in a course of action affecting the parties' posture in resolving their difficulties. Recourse to tactics of this nature by a party that ought at all times to appear to exercise good faith can only be described as questionable.

All applications for consent to prosecute under the PSSRA have concerned alleged unlawful strike activity. According to statistics compiled by the Department of Labour, Labour Data Branch, there have been well over a hundred 'work interruptions' in the public service since the Act came into force that did not occur within the period that a strike is permissible under section 101 of the Act. The majority of these work interruptions occurred in Post Office installations. Most of the interruptions in the public service lasted only a day or two, but some continued for several days longer. Applications for leave to prosecute employees involved in these interruptions have been relatively few. It is difficult to present any meaningful statement about the effectiveness of this type of recourse in dealing with unlawful strikes. Some applications named as respondents one or two persons; others named a large number, even hundreds. In many instances where consent was sought, the applications were not made until some months had elapsed after the work interruption occurred. Even where leave was granted, the courts have often appeared to treat the accused leniently. Frequently the penalties imposed have been nominal — as low as $10 — and in quite a few cases where the accused was found guilty, he was given a conditional or unconditional discharge. Since about the beginning of the 1980s, management has been inclined to impose disciplinary action in such situations, rather than to proceed by way of prosecution.

One interesting approach to the problem of dealing with employees who, the employer claimed, participated in an unlawful strike was adopted in connection with a lawful strike by employees in the clerical and regulatory unit in 1980. Many employees in other units, who were not entitled to engage in a lawful strike at that time, respected the picket lines established by employees in the clerical and regulatory unit and were either disciplined by the employer or informed that they would be disciplined in due course. As part of the settlement of the bargaining dispute between the employer and the Public Service Alliance of Canada 'PSAC), the bargaining agent for the clerical and regulatory unit, the parties entered into a memorandum of understanding which stipulated that the employer would withhold the *imposition of disciplinary action* until an agreed upon process had been completed. The process called for joint committees to be established to review the proposed disciplinary action and determine whether it would be appropriate in the circumstances. Where no agreement could be reached in the joint committees, the matter was to be referred to a mediator/arbitrator agreed upon by the parties or, failing agreement, appointed by the Chairman of the PSSRB. The memorandum applied to employees in all bargaining units for which PSAC was the bargaining agent, but any employee could determine to resort to the normal grievance procedure in lieu of the process provided for in the memorandum of understanding. Mr. M. Cantin, the Vice-Chairman of the Board, was appointed mediator/arbitrator in October 1981. About 3500 employees were dealt with under this process; by the beginning of April 1982, all but about 900 cases had been disposed of by mediation. The remainder were still pending. About 1500 employees chose to proceed under the normal grievance procedure, but no more than a handful of these grievances have so far been heard by an adjudicator.

The Special Joint Committee on Employer-Employee Relations in the Public Service, in its *Sixth Report*,[89] in 1976, recommended that three procedural remedies be made available for dealing with unlawful actions: disciplinary action by the employer; prosecution of an offence before the Board itself; and prosecution of an offence by the courts, after consent for so doing is obtained from the Board (as occurs at present). The Committee also recommended that the penalties for unlawful strike or lock-out action be drastically increased. In addition, recognizing that the employer may feel under pressure to grant amnesty to employees in order to induce them to return to work, the Committee recommended[90] that where services by 'designated employees' have been interrupted by an unlawful strike or an unlawful lock-out, and no action has been initiated by the employer or the bargaining agent against the offending parties, an independent Special Commissioner should be empowered to institute action against the offending parties on his own initiative.

The PSSRB has generally tried to set out at some length its reasons for the decisions it arrives at. On applications for consent to prosecute, a different practice has been adopted. As was noted in the *Clerical and Regulatory Application for Consent to Prosecute Case*:[91]

> ...if the Board refuses to give consent so that the matter ends there, the Board should, wherever possible, afford to the parties an explanation for the conclusion it has reached — either that the applicant has not made out a case on the law or the facts or, if consent is refused in the exercise of discretion, the basis on which the Board has proceeded. Where consent is granted, the parties will have their "day in court" elsewhere, and the Board should refrain from making comments that may appear to usurp the function of the court or to give direction to the court in such a way that the Board's reasons may prejudice a full and fair trial. Indeed, since the parties are not called upon to produce before the Board all the evidence they may produce before a court in such circumstances . . . any comments the Board might be inclined to make might be based on a partial account of all that has actually occurred.

As far as unlawful strikes are concerned, the employer has an additional avenue of recourse under subsection 103(1) of the PSSRA, which provides that:

> Where it is alleged by the employer that an employee organization has declared or authorized a strike of employees, the effect of which is or would be to involve the participation of an employee in a strike in contravention of section 101, the employer may apply to the [PSSRB] for a declaration that the strike is or would be unlawful and the Board, after affording an opportunity to the employee organization to be heard on the application, may make such a declaration.

A number of the general labour-relations statutes in Canada provide for the issuing of a strike declaration. However, the provision in the PSSRA goes beyond that to be found in many other such statutes in that it empowers the Board to make a declaration, not only where a strike has taken place, but also where a strike has been declared or authorized, but the employees have not yet ceased or refused to work. In addition subsection 103(2) goes on to declare:

> Where it is alleged by a bargaining agent for a bargaining unit that the participation of employees included in the bargaining unit in a strike authorized or declared, or proposed to be authorized or declared, by the bargaining agent is not or would not be in contravention of section 101, the bargaining agent may apply to the Board for a declaration that the strike is or would be lawful and the Board, after affording an opportunity to the employer to be heard on the application, may make such a declaration.[92]

Provisions of this nature have an informative and educational value. As the Ontario Labour Relations Board said in the *Tuomi Case*,[93] such provisions

> ...recognize the importance of public opinion in the settlement of industrial disputes; they provide machinery to enable public opinion to be informed on these issues so that the community is not left prey to the doubts created by the statements of self-appointed experts who do not know all the material facts.

Indeed, as the PSSRB pointed out in the *Windsor and District Branch of the Customs and Excise Union Strike Declaration Case*,[94]

> It would . . . appear that the authors of the federal legislation were placing an even greater emphasis on the informative and educational quality of the strike declaration procedure than was the case in [other jurisdictions]. One may speculate that one of the reasons for this innovative departure from what might be called the [general] pattern may have been that most of the employee organizations that operate under the Public Service Staff Relations Act had had little or no experience with the strike weapon and that they are therefore in greater need of guidance regarding the lawfulness of the strike, both as to its timing and as to the classes of persons that may lawfully engage in a strike.

A declaration under subsection 103(1) of the PSSRA may be made in relation to an employee organization as that term is defined in section 2 of the Act.[95] It cannot be made in relation to a branch or component of an employee organization that does not qualify as an employee organization.[96] In instances where the PSSRB has held that it did not have jurisdiction to issue a *declaration* under subsection 103(1) of the PSSRA because the respondent was not an employee organization, it has nevertheless made a finding, where the facts warranted, that there had been a strike, and that it was unlawful. The Board took this step in order to avoid creating the impression among the employees concerned that its refusal to issue a declaration implied that the employees' actions did not constitute a strike, or that the strike was lawful.[97]

Where an application for a strike declaration has been filed, it is customary in several jurisdictions to abridge the time for filing a reply and to expedite the hearing, a practice followed by the PSSRB. Nevertheless, if the strike has been terminated before the hearing is held, it has generally been accepted in some jurisdictions that the application has had the necessary effect, and that a declaration should not be issued unless there is a likelihood that the strike will recur, or unless there has been a history of unlawful strikes.[98] However, the PSSRB has adopted a different approach. As it said in the *Windsor and District Branch of the Customs and Excise Union Strike Declaration Case*:[99]

> It is well known that many unlawful strikes are of relatively short duration. Parliament must have been aware that it would be impossible for a tribunal constituted, structured and operating as the Public Service Staff Relations Board is and does,[100] to hear and dispose of an application for a strike declaration under s. 103(1) within a matter of a few days after the commencement of the strike. . . . If we were to accept the submission of counsel . . . [that a declaration should not be issued, since the strike was over], the enactment would be deprived of any significant effect and the value of the remedy would for all practical purposes be nil. Accordingly, we are of opinion that the Board is entitled to issue a declaration under s. 103 even though the strike that provides the occasion for the application has been terminated before the application is heard or, for that matter, before the application is filed with the Board.

The power of the PSSRB to issue a declaration under section 103 is discretionary. "In exercising its discretion, the Board must take into account all the circumstances of the case, and that includes the 'culpability', if any, that may be attributed to the employer as well as to the employees."[101] In the *Winnipeg Post Office Strike Declaration Case*,[102] the Chairman of the Board expressed the view that in ascertaining whether a strike of employees was authorized by officers of the employee organization after the employees had already gone on strike, the whole course followed by the officers of the organization ought to be taken into account; it is not necessarily the course of wisdom for an officer to reprimand the employees, and expressions of support for the employees must be looked at to see if such expressions were designed to impel the employees to return to work. The Board has taken the position that the onus on the employer in such a proceeding is somewhat heavier than in a civil proceeding, since the application deals with what is, in effect, a quasi-criminal matter; that is, a matter that has quasi-criminal overtones.[103]

Complaints of Failure to Give Effect to a Provision of an Arbitral Award

Paragraph 20(1)(*b*) provides for a complaint procedure for failure to give effect to any provision of an arbitral award.[104] In *Van Camp* v. *Public Service Alliance of Canada et al.*,[105] the complainant alleged, in a complaint under this paragraph, that in failing to support his grievance, which in his opinion was based on a provision of an arbitral award, the bargaining agent had failed to give effect to the provisions of the arbitral award. In dismissing the complaint (without a hearing, but on the basis of written representation from the parties) on the ground of lack of jurisdiction in the circumstances of the case, the PSSRB said:[106]

> In our opinion, the only reasonable interpretation that can be given to subsection 20(1)(b) is that it was designed to cover those situations where either the employer or the employee organization concerned, or their agents, failed to give effect to the provisions of an arbitral award, the meaning of which is not in dispute. Where there is a dispute as to the meaning or effect of the provision of an arbitral award contained in a collective agreement, the only vehicle for its resolution, in so far as an individual employee is concerned, in our view, must be by way of the grievance procedure and adjudication.

Three years later, in *Public Service Alliance of Canada* v. *LeClair*,[107] the PSSRB stated that the principles enunciated in the *Van Camp Case* had limited application. It said:

> The essence of the Board's decision in the *Van Camp* case is that *an employee* should not be permitted to seek redress by way of a complaint under section 20 [of the PSSRA] when the same redress is available to him by way of the grievance procedure. In the situation of Van Camp, he already had availed himself of the grievance procedure, albeit unsuccessfully, and the Board, for the reasons set out in the above quoted passage, found that his complaint did not fall within the purview of paragraph 20(1)(b) of the [Act]. Had the Board held otherwise than it did in the *Van Camp* case, it would have opened the door to a flood of complaints by individual employees which clearly were meant to be handled by the grievance/adjudication procedures provided for in the Act.
>
> ...In the *Van Camp* case the Board held that paragraph 20(1)(b) of the Act could not have been intended to be used as an avenue of redress by individual employees when the remedy which they are seeking is available to them by way of the Act's grievance/adjudication procedures.

The PSSRB held that it did have jurisdiction, under paragraph 20(1)(*b*) of the PSSRA, to deal with a complaint that the Secretary of the Treasury Board had failed to give effect to a provision of an arbitral award that gave to an employee the choice, subject to operational requirements, between taking the first Monday in August or St. Jean Baptiste Day as a designated paid holiday. The Board said in its decision that the situation in that case was quite different from that in *Van Camp*, and that the type of complaint made by the bargaining agent fell within the purview of paragraph 20(1)(*b*) of the Act, notwithstanding that the interpretation to be placed on the article of the award might be open to question. In reaching its conclusions, the Board placed emphasis on the mandatory wording of subsection 20(1): the Board *shall* examine and inquire into the complaints that fall under the subsection. If the Board upholds a complaint under the provision here under discussion, its remedial authority is limited to making an order for compliance; it cannot award damages.[108]

Complaints of Failure to Give Effect to Decisions of Adjudicators

Paragraph 20(1)(*c*) of the PSSRA provides for a complaint being made to the PSSRB for failure "to give effect to a decision of an adjudicator".[109] On such complaint, subsection 96(6) declares that the Board may, in accordance with section 20, take such action as is contemplated by the section to give effect to the decision of the adjudicator on the grievance, but it may not inquire into the basis or substance of the decision. However, in order to discharge its responsibility on such a complaint, the Board must ascertain from the decision what action the decision of the adjudicator required by or on the part of the employer.[110]

Complaints of Failure to Comply with Regulations Respecting Grievances

The final ground for complaint under subsection 20(1) of the PSSRA, contained in paragraph (*d*), relates to the failure "to comply with any regulation respecting grievances made by the Board pursuant to section 99."

In *Cardinal* v. *Dowdell*[111] the PSSRB held that the employer had a duty to reply to a grievance within the time limits contemplated by subsection 77(2) of the PSSRB *Regulations and Rules of Procedure*. However, in *Sabiston* v. *Patrick*,[112] the Board dismissed a complaint alleging that management discriminated against the complainant, contrary to section 8 of the PSSRA, by refusing to give him a satisfactory hearing on his grievance.

Complaints Concerning Non-Observance of Other Provisions of the PSSRA

There are three sections of the PSSRA for the non-observance of which no remedy is expressly provided in the legislation: that is, sections 50, 51 and 56. Section 50 sets out the obligation of the parties, once notice to bargain has properly been given, to bargain collectively in good faith and to make every reasonable effort to conclude a collective agreement. Section 51 deals with the continuance in force of certain terms and conditions of employment during the period following the giving of notice to bargain, and until an agreement has been entered into, or an arbitral award has been issued, or the statutory conciliation process has been exhausted, as the case may be. Section 56 deals with the implementation of the terms of a collective agreement. There have been a number of complaints and applications alleging non-observance of these sections.

The extent of the obligation to bargain under section 50 of the PSSRA has been discussed earlier.[113] We are concerned here with the type of process that may be instituted where it is alleged that the provisions of this section have not been complied with. Proceedings were initiated in two early cases. One, in the form of a complaint, did not identify the provision of the Act that entitled the applicant to make such a complaint. The other, in the form of a notice of motion, sought certain relief. The first[114] of these was withdrawn, and the PSSRB was not called upon to determine whether a complaint was the proper process in the circumstances. In the other,[115] although the Board dismissed the motion for reasons not here relevant, it stated that it was proceeding on the assumption that it did have jurisdiction in the matter under section 18 of the Act. It would appear that nowadays, in view of a decision of the Federal Court of Appeal[116] on a case relating to section 51, a party which alleges that there has been a non-observance of section 50 should proceed under section 18 of the Act.[117]

The first case in which a remedy was sought for the alleged non-observance of section 51 of the PSSRA, the *Canadian Armament Research and Development (CARDE) Case*,[118] was in the form of complaint but, on objection by the employer that a complaint was not the proper process in such a situation, the applicant amended the application and sought relief under section 18. In the course of its decision, the PSSRB said:

> Looking at the legislation as a whole . . . it would appear that, since the problem with which we are here concerned cannot be brought either before the Arbitration Tribunal or before an adjudicator,[119] it was in the contemplation of the authors of the legislation that it should be dealt with under the Act by the Public Service Staff Relations Board.

The position of the Board that it is entitled, on an application under section 18 of the PSSRA, to determine what remedial action must be taken by the employer when the Board finds that there has been non-observance of the provision of section 51, has now been upheld by the Federal Court of Appeal.[120]

In the *Radio Operations Agreements Implementation Case No. 2*,[121] in 1969, in a proceeding on a complaint, it was alleged that the employer had failed to issue retroactive pay cheques for overtime adjustments within the time limit set by subsection 56(1) of the PSSRA. Counsel for the employer submitted that the appropriate remedy in such circumstances would be through the grievance procedure. In holding that it did have authority to provide a remedy, the PSSRB noted that resort to the grievance procedure would have the effect of giving the employer more time to implement the terms of the agreement when it was already in default. However, it also held that it could not award damages, but could only issue a declaratory decision. This principle was followed in the *Engineering and Scientific Support Implementation Case*.[122] In that case, the Board said that a remedy on such a complaint would be available only if the language of the provision of the agreement was clear; if the meaning was in doubt, the remedy would lie through the grievance procedure.[123] In the *Rymek et al. Case*[124] the Board held that a complaint of this sort may be made by an individual employee, but that the Board's authority was limited to the making of a declaration and did not include the issuing of a directive.[125]

Notes

1. 'Unfair practices' provisions have not been included in some of the special statutes that apply to particular groups of public servants: that is, police, firemen, nurses in Prince Edward Island, teachers, and so on.

2. A number of labour-relations statutes in Canada express the entitlement of an employee to become a member of an employee organization as a 'right'. Dr. A.W.R. Carrothers, in *Collective Bargaining in Canada* (Toronto: Butterworth, 1965), p. 170, in commenting on such a provision has said: "the statutory 'right' to union membership, although cast in the language of legal claim, constitutes no more than a general declaration of legislative policy." Hughes J.A., of the New Brunswick Court of Appeal, quoted Dr. Carrothers' comment in *New Brunswick Teachers Federation* v. *Province of New Brunswick and Canadian Union of Public Employees* (1970) 3 N.B.R. (2d) 189 at 202; he added that such a provision constitutes a statement of legislative policy and was designed to relieve employees and employee organizations from disabilities they suffer at common law.

3. See Chapter 2, p. 31 ff., above.

4. The effect of this provision is that the highest form of union security that may be included in a collective agreement under the Act is maintenance of membership. See, in this connection, Chapter 4, pp. 193–94, above.

5. (1981) PSSRB file 161–18–219.

6. See above, Chapter 3, p. 81.

7. See above, Chapter 3, pp. 81–82.

8. As of 1 September 1981, complaints alleging violation of s. 8, 9 or 10 have been made in eighty-one cases; thirty-nine of these complaints were withdrawn.

9. (1971) PSSR Reports K 728 at K 736–K 737. See also *McNicoll* v. *Coupal et al.* (1978) PSSRB file 161–2–173.

10. (1979) PSSRB file 161–2–137.

11. (1978) PSSRB file 161–2–146.

12. For example, *Drouin and Lemoyne* v. *Pacelli and Morin* (1981) PSSRB file 161–2–212 (reprimand); *Ager* v. *Arcand et al.* (1978) PSSRB file 161–2–167 (transfer); *Peter* v. *Lefebvre et al.* (1977) PSSRB file 161–2–151 (evaluation).

13. *Steer* v. *Treasury Board* (1977) PSSRB file 161–2–148. However, the Board cautioned that, since "each case turns on its own facts, there may be cases where a grievance by an employee will not be a bar to his presenting a complaint under section 20." (See pp. 647–48, below.) See also *Peter* v. *Lefebvre et al.* (note 12, above).

14. *Ager* v. *Arcand et al.* (note 12, above).

15. *Eaton* v. *Eberlee and Armstrong* (1980) PSSRB file 161–2–201. The complaint in this instance alleged improper discharge and discrimination against the complainant in matters of staffing. A grievance against discharge had been dismissed, and the Board held that that grievance could not be made the ground for a complaint. There had been no grievance with respect to the staffing incidents, and the complainant was allowed to proceed with his complaint. He was unsuccessful.

16. *Ager* v. *Arcand et al.* (note 12, above).

17. (1968) PSSR Reports K 216. See also *Professional Institute of the Public Service of Canada* v. *Treasury Board* (1979) PSSRB file 148–2–34, where the bargaining agent alleged that certain provisions of a *Personnel Management Manual* issued to departmental managers, expressing opinions of the Treasury Board concerning the rights and obligations of persons *replacing* persons who were 'agreed-to exclusions', even though the designation of such persons was challenged by the bargaining agent, contravened the provisions of the PSSRA. The Board dismissed the application on the ground that there had been no violation of the Act.

18. See above, Chapter 2, p. 46 ff.

19. At K 231.

20. At K 241, K 243.

21. See above, Chapter 3, p. 81.

22. At K 255.

23. At K 256. On the evidence before it, the Board found that the statement had not been distributed to persons who did not fall within the 'identifiable' class (at K 244 and K 256).

24. (1968) PSSR Reports K 195 at K 201–K 203.

25. See above, Chapter 2, pp. 36–37.

26. See now Chapter 2, note 58, above, and note 29 in this chapter (below). A complaint under s. 20 in *Economists', Sociologists' and Statisticians' Association* v. *Her Majesty in right of Canada as represented by the Treasury Board* (1978) PSSRB file 161–2–168, was dismissed on technical grounds. See below, p. 629.

27. (1979) PSSRB files 148–2–28 and 161–2–185.

28. (1981) PSSRB file 161–2–185.

29. *Ibid*. In the course of its decision, the Board commented that "the conclusion that the Board is compelled to reach is that the employer simply did not require the large numbers that were proposed for exclusion." As we noted in Chapter 2, note 58, above, the Board has now taken the position that it would reject

an attempt by the employer to designate an excessive number of grievance officers. We also noted that at the time of writing, the Board's decision was under review by the Federal Court of Appeal.

30. See above, pp. 621–22.
31. (1979) PSSRB file 161–2–183.
32. (1981) PSSRB file 161–2–243.
33. (1981) PSSRB file 161–2–185.
34. It was held in this case that the burden of disproving the *bona fides* of the employer's action lies on the bargaining agent.
35. (1978) PSSRB file 161–2–168. The Board commented that unless specific allegations were made against an identified person, the employer would not be in a position to prepare an adequate defence.
36. (1979) PSSRB file 161–2–145. See further, in connection with this case, pp. 629–30, below.
37. (1977) PSSRB file 161–2–148.
38. *Query*: Should not the individual named in the body of the complaint have been notified of the complaint and given an opportunity to offer a defence of his actions? See also note 35, above.
39. (1971) PSSR Reports K 816.
40. See note 36, above.
41. See also Chapter 3, p. 75, above.
42. (1971) PSSR Reports K 728 at K 734.
43. See also *Ager* v. *Arcand et al.* (note 12, above).
44. (1971) PSSR Reports 1015. The proceeding was an application under s. 18 of the PSSRA (see Chapter 13, p. 672 ff., below), and not a complaint under s. 20. (See pp. 638–39, below.) However, the substance of the proceeding involved the 'unfair practices' provisions of the Act.
45. At K 1023–K 1024.
46. (1976) PSSRB file 161–2–136.
47. For a discussion of the effect of restrictive membership provisions in the constitution of an employee organization, see Chapter 3, pp. 82–84, above.
48. (1976) PSSRB file 161–2–123. For other aspects of the controversy that led to this complaint, see above, pp. 629–30.
49. The collective agreements between the employer and the Canadian Air Traffic Control Association, executed since this case arose, have been executed in both official languages.

All agreements to which the Treasury Board is a 'party' and a significant proportion of the agreements to which separate employers are 'parties' are now executed in both official languages. Most of these agreements state that both the English and French versions are official.

50. The majority of the Board added that nothing it had said in its decision should be taken in any way as condoning the attitude of the respondent. There was a vigorous dissent by two French-speaking members of the Board.

51. (1976) PSSRB files 161–2–129 and 161–2–130.

52. *Sic*. Should this have read 'bargaining unit'?

53. (1978) PSSRB file 161–2–135.

54. See above, Chapter 2, pp. 28–30.

55. (1979) 1 F.C. 232 at 235.

56. *Ibid.*, at 236.

57. In its decision in the *Montreuil Case*, the Board had relied in part on a decision of the British Columbia Supreme Court in *Fisher* v. *Pemberton* (1970) 8 D.L.R. (3d) 521 at 541 and 547, which in turn relied on several decisions of the Supreme Court of the United States, namely, *Humphrey et al*. v. *Moore* (1964) 375 U.S. 335; and *Vaca* v. *Sipes, Administrator* (1967) 386 U.S. 171. In the latter case, White J., delivering the opinion of the Court, said (at 177):

> It is now well established that, as the exclusive bargaining representative of the employees..., the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining..., and in its enforcement of the resulting collective bargaining agreement. . . . Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

The Federal Court of Appeal did not mention these cases.

58. The situation has been dealt with in a number of jurisdictions by a statutory provision imposing on a bargaining agent a duty of fair representation in the presentation of grievances. See, for example, Ontario Labour Relations Act, R.S.O. 1980, c. 232, s. 60, and the British Columbia Labour Code, R.S.B.C. 1979, c. 212, s. 7. J. Finkelman, *Employer-Employee Relations in the Public Service of Canada*: *Proposals for Legislative Change* (Ottawa: Information Canada, 1974) (hereafter referred to as the *Finkelman Report*), Part 1, pp. 226–27, recommended that there should be included in the 'unfair practices' sections of the Act a provision imposing on a bargaining agent a duty of fair representation in the

presentation of grievances. However, the duty was to be subject to the condition that a bargaining agent should not be required to process a grievance where it has withheld its consent in good faith. The Canada Labour Code now imposes upon trade unions a duty of fair representation, not only in connection with grievances, but also in respect of bargaining. See S.C. 1977–78, c. 64, s. 49, adding s. 136.1.

The foregoing recommendations were made before the *Casement and Ross* and *Montreuil* cases came before the Board.

59. See in this connection, Chapter 3, p. 119, above. For an interesting case in which a number of employees sought unsuccessfully to establish that their bargaining agents had acted in a discriminatory fashion in the administration of two collective agreements, see *Raby et al.* v. *Economists', Sociologists' and Statisticians' Association et al.* (1978) PSSRB files 161–2–163 and 161–2–164.

See also note 47, above.

60. (1967) PSSR Reports K 98 at K 103.

61. See note 42, above, at K 742, followed in *Professional Institute of the Public Service of Canada* v. *Treasury Board et al.* (1976) PSSRB file 161–2–127.

62. (1977) PSSRB file 161–2–137.

63. In *Patenaude and de St. Just* v. *Leduc and Desnoyers* (1979) PSSRB files 161–2–181 and 161–2–182, the Board followed the position taken in the *Stonehouse Case* (note 62, above), and said: "The matter in question is clearly and exclusively a civil one."

64. (1971) PSSR Reports K 786 and at K 797.

65. (1978) PSSRB files 194–2–46 and 194–2–48. See also *Jones et al.* (1981) Adjudication files 166–2–9010 to 166–2–9012 and 166–2–9030 to 166–2–9037.

66. In the *Postal Workers Strike Declaration Case No. 1* (1967) PSSR Reports K 36, the representative of the respondent seemed to suggest that as long as no bargaining agent had been certified for the employees concerned, neither the employees nor the organization of which they were members were subject to the restraints imposed by the provisions of the Act here under discussion. The Board emphatically rejected the suggestion.

67. See Chapter 10, p. 438 ff., above.

68. *Ibid.*, pp. 475–76.

69. (1971) PSSR Reports K 806 at K 808.

70. (1972) PSSR Reports K 923. For a discussion about designated employees, see Chapter 10, p. 483 ff., above. See also the *Electronics Case* discussed in Chapter 10, note 286, above. In that case the employer unilaterally 'designated' certain employees

(and so notified them) as replacements for designated employees who could not perform their duties without having followed the appropriate procedure. (This procedure would have enabled the bargaining agent to agree or object to the designations.) The PSSRB held that these employees were not on strike unlawfully. (Other employees in the unit were lawfully on strike.) The Board denied the application of the employer for leave to prosecute the employees it had designated for allegedly engaging in an unlawful strike (at K 934).

71. See p. 507–10, above.
72. See note 64, above, at K 801.
73. (1971) PSSR Reports K 756 at K 763.
74. (1972) PSSR Reports K 957 at K 970.
75. See Chapter 10, p. 480, above.
76. See Chapter 10, pp. 480–81, above.
77. There has never been an application under this subsection.
78. There has never been a prosecution under this head.
79. S. 105 is a procedural provision. It states:

> A prosecution for an offence under section 104 may be brought against an employee organization and in the name of that organization, and for the purposes of any such prosecution an employee organization shall be deemed to be a person, and any act or thing done or omitted by an officer or representative of an employee organization within the scope of his authority to act on behalf of the employee organization shall be deemed to be an act or thing done or omitted by the employee organization.

In its *Sixth Report*, the Special Joint Committee on Employer-Employee Relations in the Public Service (Ottawa: Queen's Printer, 1976) (p. 47:3) recommended that the maximum penalties for unlawful strikes be increased substantially, up to and exceeding $25 000 in some instances.

80. See, for example, *Treasury Board* v. *Certain Employees* (1975) PSSRB files 194–2–43 and 194–2–44.
81. *Treasury Board* v. *Certain Employees* (1975) PSSRB files 194–2–34 to 194–2–37 and 194–2–39.

Compare *Treasury Board* v. *Cuillerier and Dandurand et al.* (note 65, above), where, on an application for a declaration that a strike was unlawful, the Board held that the production of medical reports without the examining physicians being called as witnesses was hearsay and inadmissible, and that in cases *of this nature*, the same rules should apply as in cases before the courts.

82. *Treasury Board* v. *Chung et al.* (1975) PSSRB file 194–2–29. In the *Electronics Application for Consent to Institute Prosecution Case No. 2*, (note 74, above) at K 961, the Board gave consent when it came to the conclusion that issues of fact and law, which might properly be determined by a court of appropriate jurisdiction, had been raised with respect to the actions of an officer of the bargaining agent.
83. Note 70, above, at K 941–K 942. Consent was denied in respect of certain employees where the cause of the absence of the employees was illness (at K 934).
84. *Ibid.* at K 948.
85. *Electronics Application for Consent to Initiate Prosecution Case No. 2* (note 74, above) at K 967. The employee's efforts included a direction to designated employees to cross a picket line manned by fellow employees in the same bargaining unit, who were lawfully on strike.
86. Note 69, above at K 809.
87. (1978) PSSRB file 194–2–49.
88. (1979) PSSRB file 194–2–50.
89. P. 47:17.
90. Pp. 47:18–47:19.
91. (1975) PSSRB files 194–2–21 and 194–2–24. See also *Treasury Board* v. *Certain Employees* (note 81, above). In these cases the Board remarked that in a proceeding for consent to prosecute, a party "may not be able to produce before the Board relevant evidence because the Board lacks power to compel the attendance of witnesses or production of documents in a proceeding of this nature". At the time, the Board's authority to summon witnesses was limited. See, now, however, Chapter 13, pp. 668–69, below.
92. There was never been an application under this subsection.
93. (1953) 53 CLLC 1445 at 1447.
94. (1971) PSSR Reports K 613 at K 649–K 650.
95. See Chapter 3, p. 76 ff., above.
96. *Windsor and District Branch of the Customs and Excise Union Strike Declaration Case* (note 94, above) at K 644; *Fort Erie and District Customs and Excise Strike Declaration Case* (note 73, above) at K 764; *Pigeon River Case* (note 64, above) at K 802. In the *Windsor Case*, above, the Board noted that, in some jurisdictions, the strike-declaration provision had been expanded to authorize a declaration being issued where the employees engage in an unlawful strike that is not authorized by the employee organization of which they are members; the Board suggested that the problem ought to be considered by the appropriate authorities to deter-

mine whether amendments to the legislation were or were not desirable. No action was taken on this suggestion.

The *Finkelman Report*, Part 1, pp. 151–52, recommended that:

> ...the relevant provisions of the Public Service Staff Relations Act be amended to ensure that the Board may make a declaration not only where the parent employee organization is itself at fault, but also if the strike is called or authorized by any subordinate segment of the parent organization. . . . It is [also] recommended that the legislation should authorize the Board to issue a strike declaration where employees have engaged in an unlawful strike, even if there is no evidence of participation therein by the officers of the organization or that they condoned the unlawful action.

97. See, for example, the *Windsor Case* (note 94, above) at K 623.

98. See Jeffrey Sack and M. Levinson, *Ontario Labour Relations Board Practice* (Toronto: Butterworth, 1973), p. 222.

99. Note 94, above, at K 648.

100. At the time this decision was issued, the members of the Board, other than the Chairman and the Vice-Chairman, served on a part-time basis and resided in different parts of Canada. *Query*: Could the same reasoning apply today, when the core of the Board serves on a full-time basis, and the members of the core are resident in Ottawa?

101. See the *Windsor Case* (note 94, above) at K 648, K 650.

102. (1971) PSSR Reports K 765 at K 774.

No other legal consequences follow from a declaration itself but, as we have seen, s. 104 of the PSSRA expressly makes contravention of ss. 101 and 102 an offence punishable on summary conviction. The Special Joint Committee on Employer-Employee Relations in the Public Service, in its *Sixth Report*, p. 47:19, recommended:

> *32. That the Public Service Staff Relations Board upon application, and when it finds that there is an unlawful strike or lockout, be empowered to issue a cease and desist order in all cases of violation.*
>
> *33. That such order be filed in court and entered in the same manner as a judgment and be enforceable as such.*

A remedy by way of injunction is, of course, available to the employer for an unlawful strike, and recourse to this remedy has been made by the employer on a number of occasions. An examination of the principles applicable to such a proceeding lies outside the scope of this study.

103. See, for example, *Charlottetown Letter Carriers Strike Declaration Case* (1971) PSSR Reports K 748 at K 755; *Winnipeg Post Office Strike Declaration Case* (note 102 above) at K 775; *Pigeon River Case*

(note 64, above) at K 804. See, however, *Stonehouse* v. *Treasury Board* (note 10, above).

104. Up to September 1981 there had been twenty complaints under this paragraph, of which fifteen were withdrawn. For a discussion of complaints regarding the non-implementation of the provisions of a collective agreement, a situation not dealt with under subsec. 20(1), see p. 650, below.

105. (1975) PSSRB file 161−2−116.

106. *Ibid.*

107. (1978) PSSRB file 161−2−176. The complaint was dismissed on the merits. The Board's decision was upheld by the Federal Court of Appeal in *In re Public Service Staff Relations Board decision dated June 16, 1978* (1979) 1 F.C. 703.

108. *Hlavatos and Debroek* v. *Ritchie and Choquette* (1980) PSSRB file 161−9−207.

109. Up to September 1981 there were thirty complaints under this paragraph, of which twenty had been withdrawn.

110. *Postal Operations Case No. 6* (1971) PSSR Reports K 684 at K 685. In most cases there can be no reasonable doubt about what the employer was required to do, but where there is doubt, the Board is called upon to determine what action must be taken by the employer to give effect to the decision.

A complaint under this head in *Canadian Air Traffic Control Association* v. *Manion* (1980) PSSRB file 161−2−220 was held to be premature. Subsequently, however, a compliance order was issued. A request for review of this decision was dismissed (1981) PSSRB file 125−2−20. On a further review of the decision a short time later, the Board varied its decision and extended the time for compliance, but warned that if the order were not observed, the Board would act on a request by the bargaining agent pursuant to s. 21 of the PSSRA. No such request was made. A compliance order was also issued in *Canadian Air Traffic Control Association* v. *Lemieux* (1981) PSSRB file 148−2−63. In *Public Service Alliance of Canada* v. *Treasury Board* (1974) PSSRB file 161−2−103 and *Marleau and Canadian Union of Postal Workers* v. *Treasury Board* (1980) PSSRB file 161−2−210, complaints under this head were held premature where the decision was under review by the Board under s. 23 of the Act (since repealed). It would appear that the same result would probably follow where a proceeding for review has been instituted under s. 28 of the Federal Court Act.

111. (1979) PSSRB file 161−2−178.

112. (1981) PSSRB file 161−2−231. There were twenty-eight complaints alleging non-compliance with paragraph 20(1)(*d*) of the PSSRA up to September 1981; nineteen of these were withdrawn.

113. See above, Chapter 6, pp. 279–82, above.

114. *Manning et al. Case* (1969) PSSR Reports K 448.

115. *Financial Administration Case* (1973) PSSRB file 148–2–12.

116. *Her Majesty the Queen in right of Canada as represented by the Treasury Board and Canadian Air Traffic Control Association* (1981) 128 D.L.R. (3d) 685.

117. For a discussion of s. 18, see Chapter 13, pp. 672–77, below. Up to September 1981, there have been twelve proceedings alleging non-observance of s. 50, of which seven were withdrawn.

118. (1969) PSSR Reports K 294 at K 302.

119. See Chapter 11, pp. 559–60, above, for the types of grievances that may be referred to adjudication during the period when s. 51 applies.

120. In the *Air Traffic Control Case* cited in note 116 above.

121. (1969) PSSR Reports K 434 at K 438, K 444 and K 447. The Board commented in its decision that the parties seem to have assumed that a compliance order could be issued (at K 439). The same conclusion was reached in the *Engineering and Scientific Support Agreement Implementation Case* (1970) PSSR Reports K 460.

122. Note 121, above, at K 472–K 473, K 480 and K 482.

123. Compare the conclusion in the *LeClair Case* discussed on pp. 647–48, above. It should be noted that in that case the Board was proceeding under what it held to be the mandatory language of subsec. 20(1) of the PSSRA.

124. (1970) PSSR Reports K 497 at K 502.

125. Up to September 1981 there were fifty-seven proceedings alleging failure to implement the terms of a collective agreement; thirty-five of these were withdrawn.

13: *Administration*

The Administrative Structure

The administration of various aspects of labour-relations legislation in Canada[1] has generally been entrusted in part to an administrative agency — a labour-relations board[2] — and in part (the mediation function) to the Ministers of Labour of the respective jurisdictions. In the early days, when such legislation was first introduced, the administrative agency consisted of an equal number of members respectively representative of employees and employers, and a neutral chairman. The Public Service Staff Relations Act (PSSRA) followed this practice. Subsection 11(1) of the Act established a Public Service Staff Relations Board (PSSRB). It consisted of a Chairman, a Vice-Chairman, four members representative of the interests of employees, and four members representative of the interests of the employer, all appointed by the Governor in Council.[3] Under subsection 11(2), the Chairman and the Vice-Chairman were appointed to hold office during good behaviour for a period of ten years; they were subject to removal by the Governor in Council within that period, but only upon address of the Senate and the House of Commons.[4] In other words, they had what amounted to 'judicial tenure' during the term of their appointment. The other members were appointed under subsection 11(3) to hold office during good behaviour for a term of seven years, but could be removed by the Governor in Council for cause at any time. Subsection 13(1) declared that to be eligible for office on the Board, a person had to be a Canadian citizen who had not attained the age of seventy years. He or she could not hold any office or employment under the employer, or be a member of or hold office or employment under any employee organization that was a bargaining agent.[5]

Two of the members representative of the interests of employees, appointed when the PSSRB was first constituted in 1967, were chosen from persons recommended by employee organizations which, at the time, had a large membership among employees in the public service; these were the Public Service Alliance of Canada (PSAC) and the Professional Institute of the Public Service (PIPS). One of the other members representative of the interests of employees was chosen from a list submitted by the Canadian Labour Congress, with which a number of employee organizations having membership in the public service were affiliated. The fourth member was chosen on the recommendation of the Confederation of National Trade Unions, with which some employee organizations were affiliated that at the time were carrying on an organizational campaign to recruit membership among public servants. The four members representative of the interests of the employer were recommended by the Treasury Board. The Chairman and the Vice-Chairman served on a full-time basis; the other members of the Board as originally constituted served on a part-time basis.

The PSSRB was vested with authority to administer those provisions of the PSSRA that are similar to those generally entrusted to a labour-relations board, including those relating to, or associated with, certification and complaints and other proceedings concerning non-observance of the provisions of the legislation. The authority and powers of the PSSRB respecting such matters have been discussed in earlier chapters of this study, and we shall have further comments to make about other matters later in this chapter.[6]

Jurisdiction to administer the provisions of the PSSRA relating to the arbitration of interest disputes was given to the Public Service Arbitration Tribunal under section 60 of the Act. The Tribunal consisted of a chairman (who was responsible for the system of arbitration provided by the Act), one or more alternate chairmen, and two panels of other members; one panel consisted of at least three persons representative of the interests of the employer, and the other panel of at least three persons representative of the interests of employees. The chairman was appointed by the Governor in Council, on the recommendation of the PSSRB, to hold office during good behaviour for a period not exceeding seven years; an alternate chairman was appointed for a period not exceeding five years. Both these officers could be removed by the Governor in Council for cause, but only on the unanimous recommendation of the PSSRB. The representative members of the Tribunal were appointed by the PSSRB for such terms as that Board deemed appropriate. Before sending forward a recommendation to the Governor in Council that a certain person be appointed chairman or alternate chairman of the Tribunal, the Board canvassed the views of the employer as well as those of the bargaining agents who had opted for arbitration as the applicable dispute-resolution process. The practice followed by the PSSRB in appointing representative members of the Tribunal was to invite nominations from the employer and from the several bargaining agents who had opted for arbitration as the applicable dispute-resolution process, and to appoint such nominees. The chairman, the alternate chairmen, and the members of the two panels served on a part-time basis.

By subsection 61(1) of the PSSRA, the conditions for eligibility to hold office as a member of the Tribunal were the same as for membership on the PSSRB, but a person who was a member of the PSSRB could not also be a member of the Tribunal.[7] Each dispute referred to arbitration was dealt with by a division of the Tribunal consisting of the chairman, or an alternate chairman, of the Tribunal and one member from each of the panels, selected by the Chairman of the PSSRB.[8] By section 70 of the Act, the decision of a majority of the members of a division was the decision of the Tribunal but, where a majority could not agree, the decision of the chairman (or alternate chairman, where applicable) constituted the arbitral award concerning the matters in dispute; under section 71, the award was to be signed by the chairman (or alternate chairman) and "no report or observations thereon [were to] be made or given by any other member."

Authority over the grievance-adjudication provisions of the PSSRA was given to a chief adjudicator and a corps of adjudicators. The chief adjudicator was responsible for administering the grievance-adjudication system under the Act, subject to any regulations of the PSSRB. Under section 92, adjudicators were appointed by the Governor in Council; one of the appointees was designated chief adjudicator, and all appointments were made on the recommendation of the PSSRB. The adjudicators were appointed for a period not exceeding five years, but could be removed by the Governor in Council at any time on the unanimous recommendation of the Board. The conditions of eligibility of adjudicators were the same as those applicable to the eligibility of members of the Arbitration Tribunal. Here, also, the PSSRB, before making a recommendation, canvassed the views of the employer and of the bargaining agents. For several years the chief adjudicator and the other adjudicators served on a part-time basis. In 1969 a full-time chief adjudicator was appointed. The assignment of adjudicators to hear and determine a particular grievance was entrusted by subsection 94(2) to the chief adjudicator, but he alone could hear and determine a grievance under section 98 of the Act.[9]

As we pointed out earlier, the administration of the mediation function under labour-relations legislation has generally been entrusted to the Ministers of Labour in the respective jurisdictions. Since the Minister of Labour of Canada is a member of the government, it was not deemed proper to vest in him or her authority relating to such functions under the PSSRA. The Chairman of the PSSRB was therefore given responsibility for 'third-party' functions elsewhere entrusted to a Minister of Labour. These include the appointment of conciliators (section 52), the establishment of conciliation boards, and power to refuse to establish a conciliation board (section 78), as well as the delivery to a conciliation board of its terms of reference (section 83). Under the last-mentioned head, the Chairman of the PSSRB has authority to determine what matters are referable and, in effect, to a significant degree, to determine what matters fall within the scope of bargaining; this power is normally given under other labour-relations legislation in Canada to a labour-relations board.[10] By section 17, the Chairman is declared to be the chief executive officer of the PSSRB, and he is empowered to appoint and, subject to the approval of the Governor in Council, to fix the remuneration of, conciliators and other experts or persons with technical or special knowledge to assist the PSSRB in an advisory capacity. As we saw in Chapter 10, above, the entitlement of a party to request the establishment of a conciliation board has been suspended for the duration of the restraint period fixed by the Public Sector Compensation Restraint Act (PSCRA). It follows that the function of the Chairman in establishing a conciliation board and in determining its terms of reference is also in suspension during that period.[11]

As we noted earlier, the Chairman and the Vice-Chairman of the PSSRB served on a full-time basis, the other members on a part-time basis; the full Board met for several days about every two weeks, depending on its case load. In 1973 the PSSRA was amended[12] to provide for the appointment of three neutral deputy chairmen, and they were appointed over the next two years to serve on a full-time basis.

In 1974 the *Finkelman Report*[13] noted that "it has become imperative to provide for a full-time Board readily available to deal expeditiously with the many matters that come before it." The Report also recommended that "the functions now performed by the Public Service Arbitration Tribunal and by the adjudicators should be vested in the [PSSRB]." In support of his recommendation for the conversion of the Board from a tripartite institution to a 'public member' institution, the author of the *Report* said:[14]

> It is my conviction that, at the time when a plan of industrial relations legislation is first inaugurated, a tri-partite administration may be preferable, so that the institution created to administer the legislation may attain credibility and acceptability. But it would be a mistake for anyone to assume that the representative members of such an institution serve as advocates of the organization or the party that they were selected to "represent" on the Board. I can state without fear of contradiction that, over a period of thirty years, I have rarely encountered a member, either of the Ontario Labour Relations Board [of which the author was chairman for many years] or the Public Service Staff Relations Board, whose motivation, within a relatively short time after his appointment (by which time he had become aware of the attitude of other Board members) was to act merely as the "mouthpiece for his side". Indeed, the notion that representative members continue to be so motivated is an illusion; I am sure the public fails to appreciate adequately the objective character of the deliberations that take place in the executive sessions of a labour relations board.

These recommendations were endorsed by the Special Joint Committee on Employer-Employee Relations in the Public Service.[15] The Committee also recommended that "The Government should . . . commit itself to endeavour, in discharging its responsibility in this area to cooperate with bargaining agents in ensuring effective 'representation' on the Public Service Staff Relations Board."

The recommendations of the Special Joint Committee were implemented by an amendment to the PSSRA.[16] The amendment provided that the PSSRB should consist of a Chairman, a Vice-Chairman, no fewer than three Deputy Chairmen, and such other full-time and part-time members as the Governor in Council considers necessary to discharge the responsibilities of the Board; all these officers and members are to be appointed by the Governor in Council. The amending legislation provided (in subsection 11 [3] of the PSSRA as amended) that as far as members other than the Chairman, the Vice-Chairman and the Deputy Chairmen were concerned:

> ...the appointment shall be made from among eligible persons whose names are included in a list, prepared by the Chairman after consultation with the employer and the bargaining agents, in which the Chairman shall include:
>
> (*a*) the names of any eligible persons recommended to the Chairman by the employer or by a bargaining agent; and
>
> (*b*) the names of any other eligible persons whom the Chairman considers suitable for appointment as a member.

By the amending legislation, the terms of office of the Chairman, the Vice-Chairman and the Deputy Chairmen were set so as not to exceed ten years, and those of the other full-time members so as not to exceed seven years; there is no specified maximum term for part-time members. All members of the PSSRB are eligible for reappointment at the end of their respective terms. The eligibility requirements for membership on the Board remain unaltered, but *all* members now hold office during good behaviour for the period of their appointment. There is now no provision in the PSSRA itself governing the manner or circumstances in which any of the members may be removed from office during their respective terms. However, by an amendment to the Judges Act in 1975,[17] a special procedure, to be administered by the Canadian Judicial Council, was established for the removal of persons appointed according to an enactment of Parliament to hold office during good behaviour.

The amendment of the PSSRA also abolished the Public Service Arbitration Tribunal and vested all the functions formerly discharged by the Tribunal, as well as by the adjudicators, in the reconstituted PSSRB. As far as the adjudication of grievances is concerned, the Board has authority to determine which of its members, full-time or part-time, is to hear and determine any particular reference to adjudication. In practice a member is assigned to a reference by one of the deputy-chairmen charged with the responsibility of administering the system of grievance adjudication. The amending legislation retains the provisions of the original Act concerning the composition of the body that deals with a reference to interest arbitration, except that the presiding officer is now one of the 'permanent' members of the Board; he is either a full-time or a part-time member, who, in practice, is assigned to the reference by the deputy chairman charged with the responsibility of administering the system of arbitration. The Board continues to appoint the members of the representative panels, and a person selected by the Board from a panel is "deemed to be a member of the Board for the period of the arbitration proceedings in respect of which he is selected."[18] The provisions of the Act relating to the procedure of the Board in dealing with a reference to arbitration are the same as those that applied previously to the Arbitration Tribunal. One additional feature of the amending Act calls for mention. As we noted in Chapter 10, above, the Chairman may, in certain circumstances, appoint an arbitrator in place of the Board.[19]

Section 16 of the PSSRA, as it stood originally, provided that for the conduct of the business of the Board, at least the Chairman or Vice-Chairman and one member representative of the interests of each of the parties (that is, the employer and the employees) be present. At the direction of the Chairman, the powers, duties and functions of the Board could be exercised by a division consisting of either the Chairman or the Vice-Chairman and an equal number of members representative of each of the interests. A decision of those present at any meeting was to be the decision of the Board, but if both the Chairman and the Vice-Chairman were present, only the former could vote.

Prior to the 1975 amendment, it was the normal practice for the PSSRB to meet and sit as a whole, unless a member were unavailable; the Chairman or, in his absence, the Vice-Chairman presided. Where a member representative of one of the interests was not in attendance, his 'opposite number' sometimes sat on a hearing, but was publicly identified at the hearing as a non-voting member for the proceeding. It was not the practice during this period for the Board to sit in divisions.

The amended Act[20] provides that, for the conduct of business other than a proceeding before the Board, at least the Chairman or the Vice-Chairman, one Deputy Chairman, and a majority of the other full-time members have to be in attendance. For the purpose of facilitating the hearing or determination of any matter in a proceeding, the powers of the Board may be exercised and performed by a division of the Board, consisting of one or more full-time or part-time persons chosen from among the members. A part-time member is entitled to attend a meeting of the Board only where there is a proceeding before the Board in which he is involved. The common practice today is that the Board sits in divisions, especially in connection with references to adjudication, where a division usually consists of one member who may be a full-time or a part-time member of the Board.[21]

The appointment of full-time members to the PSSRB, when it was reconstituted following the 1975 amendments, ensured at the outset the effective representation on the Board of the interests of the two sides. For a time, after the Board was reconstituted, it sat in divisions that reflected the same pattern that had been observed previously. Gradually, however, the pattern changed, and nowadays members are assigned to divisions without regard to their previous affiliation or association.

Powers of the PSSRB in Proceedings Under the PSSRA

The general powers of the PSSRB, in the conduct of proceedings before it, was limited. in section 22 of the PSSRA, as it stood originally, to the hearing or determination of matters relating to certification and the hearing of complaints under section 20. The consequence of this limitation was that the Board could not summon and enforce the attendance of witnesses or exercise some of the other related powers having to do with proceedings in strike declarations, applications for consent to prosecute, and other matters that came before it, such as the designation of persons performing essential duties. Most, but not all, of the powers enjoyed by the Board under section 22 were also given to the Arbitration Tribunal under subsection 69(2) and to conciliation boards under section 85, but no such powers were given to adjudicators.[22] In 1975, section 22 was amended to give the Board power "in relation to the hearing or determination of any proceeding before it." The powers are to summon and enforce the attendance of witnesses and require the production of relevant documents; to administer oaths and affirmations; to receive evidence and information in such form as the Board sees fit (whether admissible in a court of law or not); to refuse to accept evidence not presented in the form and at the time prescribed by the *Regulations*;[23] to require the employer to post appropriate notices; to enter on the premises of the employer (subject to necessary security limitations) to observe any work, material, and so forth, and to interrogate persons; to enter on the employer's premises to conduct representation votes and to authorize any person to do a number of the things that the Board may do and to report to the Board about them.[24]

By subsection 19(1) of the PSSRA, as amended in 1975, the PSSRB is also given power to make regulations of general application concerning the designation of persons employed in a managerial or confidential capacity, the determination of appropriate bargaining units, the certification of bargaining agents, and the recording of alterations in the dispute-resolution process; the hearing or determination of matters relating to or arising out of the revocation of certification, rights, privileges and duties acquired or retained as the result of mergers, amalgamations or transfer of jurisdiction between employee organizations; the establishment of rules of procedure for Board hearings and for adjudications; the determination of the form in which and the time as of which evidence of membership in an employee organization, or objection to certification, or signification by employees that they no longer wish to be represented by an employee organization is to be presented to the Board; the hearing of complaints under section 20 of the PSSRA; the nature of the authority appropriate to constitute a council of employee organizations; and such other matters as may be incidental or conducive to the exercise of the powers of the Board.[25]

By subsection 19(2) of the PSSRA, "regulations of general application made under subsection (1) have effect upon publication in the *Canada Gazette*." In addition, as we discussed earlier, the PSSRB may, under subsection 99(1), "make regulations in relation to the procedure for the presenting of grievances". However, as we also discussed earlier, by subsection 99(2), regulations made under subsection 99(1) are not to apply in respect of employees in a bargaining unit to the extent to which they are inconsistent with the provisions of a collective agreement applicable to such employees. Finally, subsection 99(3) gives to the Board authority to make regulations in relation to the adjudication of grievances.[26]

We should note in passing that there is no requirement in the PSSRA for regulations made under section 99 to have effect when published in the *Canada Gazette* as there is for regulations made under subsection 19(1). However, it is the invariable practice of the PSSRB to publish such regulations in the *Canada Gazette*. Before the Board issued the first set of regulations in 1967, a draft of the proposed regulations was discussed with the employee organizations in the public service and with the employer. Consultation has also taken place on major alterations in the regulations.[27]

Procedure in Proceedings Under the PSSRA

There is no provision of general application in the PSSRA directing that in all proceedings under the Act, the parties are to be afforded a hearing. There are a number of express provisions relating to specific types of proceedings that do call for a hearing, but the language used in the several provisions is by no means uniform. Thus section 69, which deals with the procedure of rendering an arbitral award, requires the PSSRB to "give full opportunity to both parties to present evidence and make submissions". By subsection 79(3), which involves the determination of employees performing 'essential services', the Board is directed to afford "each of the parties an opportunity to make representations". Under section 103 the Board may make a declaration about the lawfulness of a strike only after affording to the employee organization or the employer, as the case may be, "an opportunity . . . to be heard on the application". In the adjudication of a grievance, the adjudicator, according to subsection 96(1), shall give both parties to the grievance an opportunity of being heard. The Chairman of the Board, on being requested to establish a conciliation board, may refuse to do so in certain circumstances, but, according to subsection 78(1), only after consultation with each of the parties. Subsection 84(1) declares that except as otherwise provided in the Act, a conciliation board may determine its own procedure, but shall give full opportunity to both parties to present evidence and make representations.

It is scarcely necessary to point out that the PSSRB is bound to observe, and has observed, the common law rules of 'natural justice':[28] the principles set out in the well-known statement of Lord Loreburn L.C. in *Board of Education* v. *Rice*,[29] that quasi-judicial administrative tribunals "must act in good faith and fairly listen to both sides . . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."[30] Indeed, even on applications for consent to the institution of a prosecution (a process where, in some jurisdictions in Canada, consent must be obtained from the Minister of Labour), which is often regarded as non-judicial (since, if consent is given, the parties will have full opportunity to be heard before the court), it has been the Board's practice to hold a hearing.[31] A hearing is also held by the Chairman of the Board in connection with a request for the appointment of a conciliation board, where one of the parties objects to including certain proposals in the terms of reference on the ground that they fall outside the scope of bargaining provided for under the PSSRA.[32] At any hearing held by the Board, it is not imperative, as it is in a court of law, that all evidence produced by witnesses necessarily be subject to cross-examination. In the *Economists', Sociologists' and Statisticians' et al. Case*[33] the Board adopted a statement by McRuer C.J. in *Re Jackson et al. and Ontario Labour Relations Board et al.*,[34] where the Chief Justice said:

> Much is said about the right to cross-examine witnesses who may supply evidence before an administrative board, but I do not think any of the authorities go so far as to state that all witnesses must be submitted for cross-examination. It may be that in proper cases they should be, and it may be that in another case it would be quite impossible.[35]

There are a number of situations in which a hearing before the PSSRB, in the strict sense, is not held. In proceedings to determine whether a person should be designated as someone employed in a managerial or confidential capacity,[36] a letter from the Registrar of the Board (accompanying the report of the examiner, which is served on the parties) requests the parties to inform the Board whether there are any errors or omissions in the report, and also whether the parties desire a hearing before the Board. If neither party requests a hearing, the Board will usually make a determination on the basis of the examiner's report and any written representations that may be submitted by either party. In the adjudication of grievances, an aggrieved employee may state in his notice referring the grievance to adjudication that he does not desire a hearing; if the employer concurs, no hearing may be held, and the matter may be disposed of on the written representations of the parties.[37] In addition the Board may dismiss a grievance without a hearing if the grievance is not one that may be referred to adjudication. However, before doing so, it must invite written representations from the parties. If the grievance is dismissed, the aggrieved employee may request that the Board review its decision; on receiving such a request, the Board may either hold a hearing, or it may confirm its decision on the basis of written representations without holding a hearing.[38] In the early 1980s, in a number of instances, applications for certification were disposed of on the written consent of the parties without an oral hearing.[39]

Incidental Powers of the PSSRB Under Section 18 of the PSSRA

The PSSRA contains specific provisions establishing the powers of the PSSRB with respect to a variety of matters such as applications for certification; applications for revocation of certification; designation of persons employed in a managerial or confidential capacity; a determination whether an employee is included in a bargaining unit; successor rights; arbitration of interest disputes; adjudication of grievances; designation of employees engaged in 'essential services'; complaints concerning the non-observance of certain provisions of the Act and certain other matters; declarations concerning the lawfulness of a strike; and applications for consent to institute a prosecution. The Board's powers in these situations have been dealt with in other chapters of this study.[40] In addition, section 18 of the Act declares:

> The Board shall administer this Act and shall exercise such powers and perform such duties as are conferred or imposed upon it by, or as may be incidental to the attainment of the objects of, this Act including, without restricting the generality of the foregoing, the making of orders requiring compliance with this Act, with any regulation made hereunder or with any decision made in respect of a matter coming before it.

As we have seen, the PSSRB has relied on this section as giving it authority to deal with a number of situations for which no remedy was expressly provided under the PSSRA: for example, allegations of failure to bargain in good faith or to make every reasonable effort to achieve a collective agreement or to give effect to the provisions of a collective agreement.[41]

The exercise of the PSSRB's authority under section 18 of the PSSRA came for review by the Federal Court of Appeal in a number of instances. In the *Engineering and Scientific Support Agreement Implementation Case*,[42] on a complaint alleging that the employer had failed to implement certain collective agreements in compliance with section 56 of the Act, the Board had said:[43]

> We are unable to construe s. 18 as meaning that, in the exercise of powers incidental to the attainment of the objects of the Act, we have authority to do anything and everything we may consider to be necessary to attain those objects. Incidental powers can be no more than powers that are accessory, subordinate, subsidiary to or dependent upon those that are primarily conferred. For example, in order to enable the Board to determine whether an applicant for certification is an employee organization within the meaning of s. 2(*n*) of the Act, the Board may wish to examine the constitution and minutes of an applicant. A direction to the applicant to file these documents with the Board would be an exercise of power incidental to the attainment of the objects of the Act. It would be possible to multiply examples endlessly. On the other hand, the Board's incidental powers certainly do not extend to such a substantial matter as the assessment of damages. If the incidental powers vested in the Board were as broad as the representative of the [applicant] contends they are, it would have been unnecessary to add at the end of s. 18 the *non-obstante* clause vesting in the Board in express terms authority to issue compliance orders. We find that the Board has no jurisdiction to accede to the request of the [applicant] that we assess damages for failure of the Employer to comply with s. 56.

Some doubt was cast on the extent of the PSSRB's powers under section 18 of the PSSRA by the decision of Jackett C.J. in the *Postal Management Case*;[44] the Chief Justice said, with respect to the Board's authority under section 18, that: "An authority to make a purely declaratory decision is not, in my view, to be implied from a statutory provision imposing on a body the duty to administer an Act nor from a provision requiring it to exercise such powers as may be incidental to the attainment of its objects; nor does such an authority fall within a power to make orders requiring compliance with the law or a decision." In *Stewart et al.* v. *Treasury Board et al.*,[45] an application was made under section 18 by a bargaining agent seeking, in effect, a declaration that would restrain the employer from designating what was alleged to be an excessive number of persons required to deal with grievances on behalf of the employer. The Board, in dismissing the application, said: "The pronouncements of the Federal Court . . . must be seen to be decisive and dispositive of the Board's authority to entertain applications for a declaration."

In the *Clennett Case*,[46] in the same year as the *Stewart Case*, the PSSRB was called upon to consider whether it had authority, under section 18 of the PSSRA, to deal with an application by a bargaining agent for a determination concerning the employer's claim that a certain person was not an employee within the meaning of the Act, in that he came within heads (*a*) or (*b*) of the definition of "a person employed in a managerial or confidential capacity" in section 2 of the Act.[47] The Board, in holding that it did have such authority, said:

> Clearly where specific provisions of the Act establish procedures or allow for the making of regulations to deal with the application or enforcement of sections of the Act, there is no need to refer allegations of non-compliance to the Board under section 18. Allegations of non-compliance of that kind should, of course, be dealt with under such specific provisions. There are, however, other sections of the Act which either define terms or impose obligations on the parties which are fundamental to the operation of the Act and for which no specific procedure is provided that empowers the Board to determine allegations of non-compliance.
>
> . . .
>
> Disagreements as to the meaning or application of a particular definition, or as to whether a party has or has not complied with a particular provision of the Act, are a regular and, indeed, an expected occurrence in the administration of labour relations legislation. In the absence of a specific procedure for the determination of issues of this kind, section 18, unless it is viewed as simply a general statement with no real purpose, must be interpreted as providing the Board with authority to determine such issues and, where appropriate, to make orders requiring compliance with the Act.

In dealing with the contention of counsel for the employer that the PSSRB was being asked to make a declaratory decision contrary to the ruling of Jackett C.J. in the *Postal Management Case*, the Board said:

> ...the substance of the applicant's position is an allegation that the unilateral action of the employer in excluding Mr. Clennett from the definition of "employee", by virtue of paragraph (a) of the definition of "person employed in a managerial or confidential capacity", was not in compliance with its provisions. In other

> words, the bargaining agent is alleging that the provisions of the Act, i.e., paragraph (a) of the definition, have been improperly applied to Mr. Clennett. Accordingly, the Board is not being asked to make a purely declaratory decision. It is being asked, rather, to determine the validity of the above allegation and, if the applicant makes its case, to issue an order directing the employer to comply with the Act.

The PSSRB's decision in the *Clennett Case* was upheld by the Federal Court of Appeal on an application for review of this decision under section 28 of the Federal Court Act.[48] Heald J., speaking for the Court, said:

> I do not agree that the decision in this case was a purely declaratory decision. The decision in this case was a jurisdictional decision and was necessary as a preliminary essential to a determination of the issue before it. In the event the Board had decided it was without jurisdiction, the practical result would have been that Mr. Clennett would remain excluded from the status of employee as defined in the Act. The rights conferred upon an employee by section 6 would not accrue to Mr. Clennett. Conversely, the prohibitions upon persons employed in a managerial or confidential capacity as set out in sections 8 and 9 of the Act would apply to him. Thus, the jurisdictional decision by the Board was not purely declaratory nor was it made in a vacuum. The decision was necessary for the proper carrying on of the Board's duties and that decision carries with it very definite consequences for the individual concerned. The applicant relied on the decision of this Court in [the *Postal Management Case*]. In my opinion, that case has substantially different facts from the case at bar because there the union requested a declaration under section 18 of the Act. . . . For the reasons stated *supra*, I have concluded that the decision here was not "a purely declaratory decision". Consequently the decision of the Court in the [*Postal Management Case*] *supra* . . . does not apply to the instant case where the Board's decision has very practical and tangible consequences.[49]

Before the Federal Court of Appeal heard the application for review in the *Clennett Case*, the PSSRB was called upon, in *Public Service Alliance of Canada and Treasury Board*,[50] to deal with an application made under section 18 of the PSSRA, alleging that the employer had failed to comply with section 51 of the Act, which continues in effect terms and conditions of employment during the period of bargaining for a new or renewed agreement.[51] Deputy Chairman Kates relied on the views expressed by the Board in the *Clennett Case* and distinguished the situation in the case before him from the one that had arisen in the *Postal Management Case*. He said:

> It must be stressed here that the Board is not being asked to make a purely declaratory decision based on a hypothetical circumstance without a substantive legislative root in the Act. The bargaining agent has alleged that a provision of the Act has been breached. It has asked the Board to make an order requiring the employer to comply with the Act. Surely, where the Board has the authority to make such an order under section 18 of the Act a declaration with respect to any wrong doing is both implicitly and necessarily incidental to the discharge of its duties to administer the Act.

Deputy Chairman Kates came to the same conclusion in *Canadian Air Traffic Control Association* v. *Treasury Board*,[52] where again the applicant alleged that the employer had failed to comply with section 51 of the PSSRA. Considering the evidence and submissions before him, he issued a compliance order.[53] Upon application under section 28 of the Federal Court Act, a majority of the Federal Court of Appeal upheld his decision.[54] In their decisions, all members of the Court dealt with the construction to be placed on section 51 of the Act and its application in the circumstances of the case. They did not mention section 18, and all of them seemed to have assumed that in the situation, section 18 endowed the Board with powers to issue a compliance order.

In an earlier case, *Radio Operations Agreement Implementation Case No. 2*,[55] the PSSRB had indicated its reluctance to issue a compliance order in a situation where it found that the employer had failed to comply with subsection 56(1) of the PSSRA. This subsection deals with the time specified for the implementation of a collective agreement.[56] The Board said:[57]

> There are two remedies that might be considered as being appropriate: (i) a declaratory decision; (ii) a compliance order of some sort. We believe that the second of these alternatives is not available here. There is little practical value in issuing a compliance order unless there is some sanction that can be invoked if the order is disobeyed or ignored. If the only sanction for a *compliance order* is to be found in the moral effect that it may have, the issuance of a compliance order is, so far as the law is concerned, no more than a quixotic gesture. If the person to whom the order is directed is disposed to observe it, it is highly probable that he would conform to a declaratory decision just as readily. If he is not so disposed, he may disregard the order. Compliance orders are expressly provided for under s. 20 of the Act for the types of complaints enunciated in that section and the Act then goes on in s. 21 to provide a sanction for non-compliance with those orders in the form of a report to the Minister through whom the Board reports

> to Parliament and the Minister is required to lay the report before Parliament within a fixed period of time. No such sanction is envisaged for any action the Board might think it should take in regard to non-compliance with s. 56. The only sanction, if sanction it can be called, that might be invoked in such an event would be for the Board to include a statement concerning the non-compliance in its next annual report to Parliament, a course that would prove of little practical value to a successful complainant at a point of time where the "sanction" might have any material significance for him.[58]

In view of the more recent decisions referred to above and the decision of the Federal Court of Appeal in the *Air Traffic Control Case*, the opinions expressed by the PSSRB in the earlier cases may no longer be regarded as authoritative. Nevertheless, the question still remains whether a compliance order in connection with applications alleging non-compliance with such provisions as section 50 (which sets out the nature of the obligation of the parties to bargain),[59] section 51 and section 56 has any significant value.

Power of the PSSRB to Review or Amend Decisions

In its original form, the PSSRA, as enacted in 1967, provided in section 23:

> Where any question of law or jurisdiction arises in connection with a matter that has been referred to the Arbitration Tribunal or to an adjudicator pursuant to this Act, the Arbitration Tribunal or adjudicator, as the case may be, or either of the parties may refer the question to the Board for hearing or determination in accordance with any regulations made by the Board in respect thereof, but the referral of any such question to the Board shall not operate to suspend any proceedings in connection with that matter unless the Arbitration Tribunal or adjudicator, as the case may be, determines that the nature of the question warrants a suspension of the proceedings or unless the Board directs the suspension thereof.[60]

When the PSSRA was amended in 1975, and the functions of the Arbitration Tribunal and the adjudicators were transferred to the PSSRB, this provision became obsolete and was repealed. However, the Board was given, and retains, the power to review its decisions. Section 25 provides:

> The Board may review, rescind, amend, alter or vary any decision or order made by it, or may rehear any application before making an order in respect thereof, except that any rights acquired by virtue of any decision or order that is so reviewed, rescinded, amended, altered or varied shall not be altered or extinguished with effect from a day earlier than the day on which such review, revision, amendment, alteration or variation is made.

Review of PSSRB Decisions by the Courts

The PSSRA contains, in section 100, a broad privative clause that reads:

> (1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board,[61] an arbitrator appointed under section 62 or an adjudicator is final and shall not be questioned or reviewed in any court.
>
> (2) No order shall be made or process entered and no proceeding shall be taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain the Board, an arbitrator appointed under section 62 or an adjudicator in any of its or his proceedings.

The extent to which a privative clause of this nature protects a quasi-judicial tribunal was fully considered in *Toronto Newspaper Guild, Local 87, American Newspaper Guild* v. *Globe Printing Company*.[62] It is clear that such a clause does not afford a tribunal what might be described as 'blanket' protection if its exceeds its jurisdiction or fails to exercise its jurisdiction. However that may be, decisions of the PSSRB are now subject to review by the Federal Court of Appeal by section 28 of the Federal Court Act[63] which provides:

> (1)...the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal
>
> (*a*) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (*b*) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
>
> (*c*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

An application under this provision may be made by the Attorney General of Canada or by any party directly affected by the decision or order. In addition the federal board, commission or tribunal concerned may, at any stage of its proceedings, refer any question or issue of law, of jurisdiction, or of practice and procedure to the Federal Court of Appeal for hearing and determination.[64]

The situation in which review by the Federal Court of Appeal may be sought under the foregoing provision has been discussed in *Reference re Public Service Staff Relations Act*, where Jackett C.J. said:[65]

> It is important to note that this provision is not authority to give an advisory opinion. . . . Section 28(4) contemplates "a question or issue of law" arising at some "stage" of a tribunal's "proceedings" being referred to this Court by the tribunal for "hearing and *determination*" (the [italics are] mine).
>
> In my view, such a reference can only be made by an order of the tribunal in question that puts before this Court such findings of fact, or other material, as that tribunal would base itself on if it were determining the question or issue of law itself. Furthermore, in my view, section 28(4) in so far as questions of law are concerned, contemplates only the determination of a question of law that must be determined for the purpose of dealing with the matter that is before the tribunal making the reference and does not contemplate determination of a question of law expressed in academic terms.

In a footnote to his decision, Jackett C.J. said:[66]

> A question or issue of fact is "determined" by making a finding of fact, where there has been a dispute with regard thereto, on the evidence. A question or issue of law is "determined" by making a finding as to the legal consequences that flow from facts as found or agreed on, where there has been a dispute with regard thereto. An order of reference under section 28(4) should, in my view, set out the facts established before the tribunal, indicate the dispute that has arisen before the tribunal as to the legal consequences flowing from these facts, and refer the question or issue of law to this Court for hearing and determination.[67]

Protection of Personnel of PSSRB and Others Against Requirement to Give Evidence in Civil Proceedings

While the decisions of the PSSRB are subject to review by the Federal Court of Appeal in the circumstances discussed above, members of the Board, conciliators, conciliation boards, adjudicators and members of the staff are protected against liability in civil proceedings respecting information obtained by them in the course of their duties. Section 107 of the PSSRA declares that:

> No member of the Board or of a conciliation board and no adjudicator, conciliator or officer or employee of or person appointed by the Board and no arbitrator appointed under section 62 shall be required to give evidence in any civil action, suit or other proceeding respecting information obtained in the discharge of his duties under this Act.[68]

Observance of Precedent in PSSRB Decisions

It is obvious that in any system such as operates under the PSSRA, where different divisions of the PSSRB may be dealing with similar or identical issues, there is need for a high degree of consistency in the decisions of the several divisions. It is also obvious that no decision of one division is binding as a precedent on other divisions. A comment was made on the situation in *Brewer*,[69] where a decision of an adjudicator in an earlier case was characterized by counsel for one of the parties as 'illegal'. Deputy Chairman Kates said in this connection:

> The "legality" of a Board decision in the sense of whether it is right or wrong is not a conclusion that appropriately can be determined by another member of the Board. The Board may disagree with or prefer not to follow the decision of one of its colleagues. And in doing so, the Board would in the exercise of its responsibilities pronounce reasons for departing from an established precedent. The "legality" of the result, however, can only be ascertained upon an appropriate application for judicial review before the Federal Court. And of course the party that feels aggrieved by a particular Board result must endure the burden of seeking the decision's demise.
>
> The distinction is of utmost importance. A Board decision so long as it remains unchallenged constitutes a viable and compelling precedent governing its present view of a particular state of affairs. That decision is intended to serve the parties, in the absence of a court ruling to the contrary or perhaps an appropriate Legislative amendment, as a guide with respect to their future conduct. That is not to say that the Board is necessarily enslaved to its previous decisions. But unless otherwise convinced by good and substantial reason to the contrary, any party that elects to disregard a Board

precedent in the conduct of its affairs, irrespective of an adverse opinion as to its "legality", does so at its own peril.

The Pay Research Bureau

An important instrumentality in the federal collective bargaining system is the Pay Research Bureau. The Bureau was established in 1957 under the aegis of the Civil Service Commission, as the present Public Service Commission was then known. The task of the Bureau, as the Preparatory Committee said in its *Report*,[70] was "to develop a programme of studies designed to produce information on rates of pay and conditions of employment applying to particular occupations inside and outside the Service." The Bureau provided this information to the principal staff associations as well as to the various government agencies concerned with pay determination. In its *Report* the Committee considered whether, under the system of collective bargaining it proposed, there would be a place for the Bureau. After noting[71] that it might be argued that in a collective bargaining environment, there would be no need for the continued existence of such an institution, since the parties "will want to rely on their own sources of information and will be reluctant to accept and use information supplied by a neutral body," the Committee concluded that "there will be both a need and a vital role for an independent pay research unit." It therefore recommended "that the Pay Research Bureau be retained as an independent and impartial unit and be placed under the general administrative jurisdiction of the Chairman of the Public Service Staff Relations Board."

The recommendation of the Preparatory Committee was accepted, and early in 1967, when the legislation came into force, the Bureau was placed under the administration of the Chairman of the PSSRB. Although the Bureau is not mentioned in the PSSRA, its operations are included in the estimates of the Board that are submitted to Parliament.[72]

In April 1967 the Chairman of the PSSRB gave the following terms of reference to the Bureau:

> 1. The Pay Research Bureau is authorized to obtain information on rates of pay, employee earnings, conditions of employment and related practices prevailing both inside and outside the Public Service to meet the needs of the parties to bargain or, in the case of occupational groups for which no bargaining agent is certified, as may be requested by the employer.

> 2. The findings of the Bureau will be made available to the employer and to the certified bargaining agent concerned, and to such other interested persons or agencies as the Director considers proper in the public interest.
> 3. To avoid unnecessary duplication of effort, where it is feasible and consistent with the objectives and standards under which it operates, the Bureau should utilize the data collected by and the collection and processing facilities of other research and statistical agencies of the federal government.

As the *Second Annual Report* of the Board, 1968–69,[73] noted:

> A distinctive facet of the organizational arrangements surrounding the Pay Research Bureau from its inception was the provision for consultation through the Advisory Committee on Pay Research, comprising representatives from the principal civil service staff organizations as well as from government agencies, under the chairmanship of a Civil Service Commissioner. . . . The establishment of collective bargaining made necessary a reorganization of this advisory committee structure . . . to provide for the many new bargaining agents and employers whom the Bureau was required to serve. . . .

The Advisory Committee now consists of representatives of the bargaining agents[74] and representatives of the Treasury Board and the separate employers where bargaining agents have been certified for their employees. The Director-General of the Bureau is also a member. Separate employers where no bargaining agent has been certified for the employees are entitled to participate in the Advisory Committee, but some have not availed themselves of this privilege. Formerly the Advisory Committee was chaired by the Vice-Chairman of the PSSRB[75] and is now chaired by the Chairman of the Board. The function of the Advisory Committee is to advise on the scope, priority and other aspects of the Bureau's work in preparation for collective bargaining. The members are consulted on the employers in the public and private sectors from whom information is to be sought and on 'bench-mark jobs' that are to be surveyed. However, the final determination on these matters rests with the Director-General of the Bureau. On occasion subcommittees of the Advisory Committee are set up to deal with problems concerning special groups.[76]

The surveys prepared by the Bureau are released to the bargaining agents, to the employers in the public service, and to the employers who have provided information to the Bureau. Information supplied to the Bureau is treated as confidential, and the Bureau's reports are presented in such a form as to preserve confidentiality.

The extent to which such confidentiality could be preserved, and whether the staff of the Pay Research Bureau were entitled to the protection of section 107 of the PSSRA came for consideration in the *Economists', Sociologists' and Statisticians' Case.*[77] In the course of a proceeding on a reference to the Arbitration Tribunal, the employer submitted certain documents that had been prepared by the Bureau. The bargaining agent requested the Tribunal to require the Bureau to produce certain documents it had obtained from employers; this information had been supplied on the assurance that it would be treated in confidence and held by the Bureau. The Tribunal ordered the Director of the Bureau to appear before it and produce the documents. When the Director objected to producing the documents in view of the provisions of section 107, the Tribunal set aside its order. The bargaining agent then referred the matter to the PSSRB under section 23 of the Act (since repealed). The Board thereupon referred to the Federal Court of Appeal, on the basis of section 28 of the Federal Court Act, the question whether section 107 protected the Director of the Bureau or his representatives. Although the Board considered that it had the ability and competence to determine the issue, it preferred to refer the matter directly to the Court "because of the special relationship between the Chairman and the Vice-Chairman of the Public Service Staff Relations Board and the Pay Research Bureau" and the possibility that "in the circumstances pertaining to this particular issue, 'justice may not appear to be done' if the Board itself were to deal with this issue." When the matter came before the Court,[78] Jackett C.J. held that the 'reference' made by the Board was "not such a reference as is contemplated by section 28(4)" and that "the Court does not answer the question contained therein." Nevertheless, he expressed the opinion that a matter before the Public Service Arbitration Tribunal is a "'Civil . . . proceeding' within the meaning of those words in section 107 of the *Public Service Staff Relations Act*", that "the Pay Research Bureau is a branch of the Board's staff whose function it is to provide a service that is 'incidental to the attainment of the objects of this Act' within the meaning of these words in section 18 of the Public Service Staff Relations Act," and that "the Director or any other member of the Pay Research Bureau is entitled . . . to the protection of section 107." The other members of the Court concurred in the disposition of the matter by the Chief Justice, but "expressed no opinion as to whether section 107 applies to members of the Pay Research Bureau."[79]

A former Director of the Bureau has given the following account of the manner in which the Bureau conducts its surveys:[80]

> The preferred survey method of the Pay Research Bureau is through personal visits [to representative employers] in the course of which a detailed process of job matching occurs. Fundamental to this process is knowledge of the governmental occupations to be surveyed derived from extensive pre-survey examination of the jobs in question and the development of survey specifications which are the subject of consultation with the parties concerned. This job matching process is the sole responsibility of the Pay Research Bureau and the officers on its staff must have a broad knowledge of classification, organizational structures and compensation practices in order to be able to perform this job effectively.
>
> Several major surveys and functional (or in-depth occupational) studies are conducted each year with the major projects of the Bureau being repeated at annual or biennial intervals depending to some extent on the character and basic importance of certain types of occupational data and the stated needs of the parties. Wherever possible in its projects, the Bureau collaborates closely with other survey organizations of government, in particular the Canada Department of Labour and Statistics Canada, to avoid unnecessary duplication of effort. However, since these organizations respond to a different clientele and to different needs than does the Pay Research Bureau, and since their occupational survey techniques are different, total reliance on the data which they collect is not possible.

In addition to the regular provision of data on rates of pay, the Bureau carries out an active research program. A manual containing an analysis of terminology and incidence of occurrence of a number of provisions of public service agreements has been prepared and is regularly updated. Reports of the costing of provisions of collective agreements, cost-benefit analysis of selected provisions in collective agreements, productivity measurement in the public sector, and an exploratory study on total compensation, among other data, have also been prepared and published.

Notes

1. We are speaking here of the type of labour-relations legislation in effect since the early 1940s. Legislation for conciliation or mediation in employer-employee disputes, such as the Industrial Disputes Investigation Act, first enacted in 1907, S.C. 1907, c. 20, was administered by the respective Ministers of Labour in the several jurisdictions.

   In the 1930s, statutes were enacted in a number of jurisdictions that set out a code of unfair practices. This code was designed to protect persons who became, or sought to become, members of trade unions: Nova Scotia Trade Union Act, S.N.S. 1937, c. 6; Alberta Industrial Conciliation and Arbitration Act, S.A. 1937, c. 75; British Columbia Industrial Conciliation and Arbitration Act, S.B.C. 1937, c. 31; Saskatchewan Freedom of Trade Union Association Act. S.S. 1938, c. 87. A similar code (s. 502A) was introduced into the Criminal Code of Canada by S.C. 1939, c. 30, s. 11. Contravention of the provisions of these statutes was dealt with in the courts by way of prosecution.

2. One of the first collective bargaining statutes in Canada, the Ontario Collective Bargaining Act, S.O. 1943, c. 4, entrusted the administration of the legislation to a Labour Court (a branch of the Supreme Court of Ontario) established by the Judicature Amendment Act, S.O. 1943, c. 11. Under the Quebec Labour Code, R.S.Q. 1977, c. C–27, jurisdiction is vested in a Labour Court established under s. 112 ff.

3. The subsection provided that "not less than four nor more than eight" representative members were to be appointed. Subsec. 11(4) provided that:

   > No member shall be appointed . . . as being representative of the interests of the employer or of the interests of the employees without there being appointed a member representative of the other interest or whose appointment will result in there being a different number of members representative of the interests of the employer and employees respectively.

4. But see below, p. 666.

5. Subsec. 13(2), as amended by S.C. 1974–75–76, c. 67, s. 5, provides that:

   > Where a member ceases to be a member for any reason specified in subsection (1) or for any other reason other than for cause, he may, notwithstanding anything in this Act, carry out and complete any duties or responsibilities that he would otherwise have had if he had not ceased to be a member in connection with any matter
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   >
   > (*a*) that came before the Board while he was still a member thereof; and

(*b*) in respect of which there was any proceeding in which he participated as a member.

6. See below, pp. 672–77.
7. The reason for this condition of ineligibility was that under s. 23 of the Act, as originally enacted, questions of law or jurisdiction that arose in connection with any matter that had been referred to the Tribunal were subject to review by the Board (see below, p. 677). A further ground of ineligibility applied, not to membership in the Tribunal, but to participation in certain proceedings before the Tribunal. Subsec. 61(3) provided that:

   > No person shall act as chairman or as an alternate chairman of the Arbitration Tribunal or as a member thereof in respect of any matter referred to arbitration, if he has at any time since a day six months before the day of his appointment acted in respect of any matter concerning employer-employee relations as solicitor, counsel or agent of the employer or of any employee organization that has any interest in the matter referred to arbitration.

   No similar ground of ineligibility applied to members of the Board, but it did apply to adjudicators: see subsec. 92(6).
8. In selecting a member of the panel representative of the interests of the employees on a particular reference, the Chairman does not consider himself bound to choose a member who had been nominated by the bargaining agent involved in that reference.
9. For a discussion of s. 98, see Chapter 11, p. 564, above.
10. J. Finkelman, *Employer-Employee Relations in the Public Service of Canada: Proposals for Legislative Change* (Ottawa: Information Canada, 1974) (hereafter referred to as the *Finkelman Report*), Part I, p. 144, recommended that authority to deliver terms of reference to a conciliation board be transferred to the PSSRB, rather than be entrusted to the Chairman of that Board in his personal capacity.
11. See Chapter 10, pp. 474–75, above.
12. S.C. 1973–74, c. 15.
13. The *Finkelman Report*, Part I, p. 255. The *Report*, Part I, pp. 260–61, made recommendations concerning the composition of the Board; most of these were incorporated in the amending legislation and in the practice followed in appointing members to the Board after the amending legislation came into force.
14. *Ibid.*, pp. 250–51.
15. *Third Report*, (Ottawa: Queen's Printer, 1975) pp. 36:8–36:10.
16. S.C. 1974–75–76, c. 67.

17. R.S.C. 1970, c. J−1, as amended by R.S.C. 1970, c. 16 (Second Supplement), and as amended by S.C. 1974−75, c. 48, s. 18. The relevant portions of the provision are as follows:

> 32.1 (1) The Council shall, at the request of the Minister of Justice, commence an inquiry as to whether a person appointed pursuant to an enactment of Parliament to hold office during good behaviour . . . should be removed from office for any of the reasons set out in paragraphs 32(*a*) to (*d*).
>
> . . .
>
> (3) The Governor in Council may, on the recommendation of the Minister of Justice of Canada, after receipt of a report . . . in relation to an inquiry under this section in connection with a person who may be removed from office by the Governor in Council other than on an address of the Senate or House of Commons or on a joint address of the Senate and House of Commons, by order, remove the person from office.

The grounds for requesting removal referred to in subsec. 32.1(1) are age or infirmity, misconduct, failure in the due execution of a person's office, and being placed, by conduct or otherwise, in a position incompatible with the due execution of a person's office.

The Canadian Judicial Council consists of the Chief Justice of Canada and the Chief Justice and Associate Chief Justice of each superior court or branch or division of such court (subsec. 30[1]).

18. PSSRA subsec. 61(2), as amended by S.C. 1974−75−76, c. 67, s. 12. The *Finkelman Report*, Part I, p. 262, recommended that in interest disputes, a party to a reference to arbitration should be entitled, with the approval of the Chairman of the PSSRB, to appoint an *ad hoc* representative member, rather than have the Chairman make a selection from the appropriate panel.

19. Chapter 10, p. 439, above.

20. S.C. 1974−75−76, c. 67, s. 7.

21. But see above, Chapter 11, note 75, for the assigning of three members in special circumstances.

22. In its *Second Annual Report, 1968−69*, p. 76, the Board noted that the "lack of such power raises a problem of some concern. It is thought undesirable that they should ever be placed in the position of rendering a decision when it is known or suspected or alleged by either of the parties that evidence is being withheld or is not available from a reluctant witness."

23. See, in this connection, Chapter 3, p. 95, above, and note 82 in that chapter.

24. The Board was also expressly given powers to deal with certain specific matters, such as certification, and so on. These powers have been dealt with elsewhere in this study.

25. In the *Engineering and Scientific Support Agreement Implementation Case* (1970) PSSR Reports K 460, the applicant submitted that the Board had authority under s. 18 (see below, pp. 672–77) and paragraph 19(1)(*l*) to issue regulations (as a remedy in the proceeding) governing the manner in which the employer should observe s. 56 of the PSSRA. In rejecting this submission, the Board remarked (at K 490) that its authority to make regulations is legislative in nature, and that a division of the Board dealing with an application under s. 18 ought not to arrogate to itself, in a judicial proceeding, the power to issue regulations under s. 19. The same position was taken by the Board in *Stewart et al.* v. *Treasury Board et al.* (1979) PSSRB files 148–2–28 and 161–2–185; there the Board said, in dealing with the parties in a particular case, that it should not "apply its rule making powers on an *ad hoc* basis to remedy a perceived fault" committed by one of the parties. That power should "be resorted to in the atmosphere of calm deliberation with all the ramifying effects to the client groups served by this Board being taken into consideration."
26. See above, Chapter 11, pp. 569–71.
27. For the current PSSRB *Regulations and Rules of Procedure*, see PSSR Reports, D1 ff.
28. A discussion of courts' various pronouncements of what constitutes 'natural justice' is to be found in the Board's decision in the *Economists', Sociologists' and Statisticians' et al. Case* (1973) PSSRB files 148–2–43, 168–2–45, 168–2–46. The equivalent of the term 'natural justice' in the United States is 'due process'.
29. (1911) A.C. 179 at 182.
30. For a discussion of procedures before labour-relations boards, see J. Finkelman, *The Ontario Labour Relations Board and Natural Justice* (Kingston: Industrial Relations Centre, Queen's University, Reprint Series: No. 7, 1965).
31. See *Treasury Board* v. *Certain Employees* (1975) PSSRB files 194–2–43 and 194–2–44.
32. See above, Chapter 10, pp. 469–71.
33. (1973) PSSRB files 148–2–9 and 148–2–10, and 168–2–43, 168–2–45 and 168–2–46.
34. (1955) 3 D.L.R. 297 at 309–310.
35. For a discussion of whether reports of the Pay Research Bureau may be admitted in evidence without a party being afforded an opportunity to cross-examine an officer of the Bureau about such reports, see below, pp. 683–84.
36. See Chapter 2, p. 31 ff., above.
37. See PSSRB *Regulations and Rules of Procedure*, s. 83. Form 32 lacks a space for this purpose.

38. *Ibid.*, s. 87.

39. See, for example, *Communications Security Establishment Case* (1981) PSSRB file 141–13–191; *Manitoba Food and Commercial Workers, Local 852, Shilo, Manitoba Case* (1981) PSSRB file 146–18–187.

40. See Chapters 2, 3, 10, 11 and 12, above.

41. See above, Chapter 12, pp. 649–50.

42. (1970) PSSR Reports K 460.

43. At K 483-K 484.

44. *Public Service Alliance of Canada* v. *Public Service Staff Relations Board et al.* (1979) 2 F.C. 599 at 619.

45. See note 25, above.

46. (1979) PSSRB file 148–2–24.

47. See note 36, above.

48. *The Queen* v. *Professional Institute of the Public Service* (1980) 2 F.C. 295.

49. Since the decision of the Court in the *Clennett Case*, the Board has dealt with a number of similar cases in reliance on that decision. See *Patry and Young* (1980) PSSRB file 172–2–296; *Professional Institute of the Public Service and National Research Council* (1981) PSSRB file 148–9–40; *Professional Institute of the Public Service and Treasury Board* (1981) PSSRB file 148–2–36; *Public Service Alliance of Canada and Treasury Board* (1980) PSSRB file 148–2–45; *Public Service Alliance of Canada and Treasury Board* (1981) PSSRB file 148–2–46.

50. (1979) PSSRB file 148–2–39.

51. See Chapter 9, pp. 416–19, above.

52. (1981) PSSRB files 148–2–61 and 148–2–62.

53. The PSSRB subsequently, on an application under s. 18, issued an order that the employer comply with the direction of the Deputy Chairman: *Canadian Air Traffic Control Association and Treasury Board* (1981) PSSRB file 148–2–63.

54. *The Queen as represented by the Treasury Board and the Canadian Air Traffic Control Association* (1982) 2 F.C. 80.

55. (1969) PSSR Reports K 434.

56. See Chapter 9, p. 411, above.

57. At K 444-K 445.

58. See also *Engineering and Scientific Support Agreement Implementation Case* (1970) PSSR Reports K 460; *Government Policy on Rights of Managers Case No. 2* (1971) PSSR Reports K 708 at K 719.

59. See Chapter 6, pp. 279–81, above.

60. In *Wright* v. *Public Service Staff Relations Board* (1973) F. C. 765, Jackett C.J. said (pp. 770–71):

> Notwithstanding the use of the word "or" in the expression "hearing or determination" in section 23, I am of the view that section 23 must be read as contemplating a reference of a question of law for "determination". A reference for "hearing" only would be a useless exercise that could not have been intended.
>
> Once it is accepted that what is contemplated by section 23 is the reference of a question of law for "determination", it would seem to me that a reference under that section is very similar in character to a reference to this Court under section 28(4) of the *Federal Court Act* and, in my view, much of my reasoning in a recent decision [in *Reference re Public Service Staff Relations Act*] concerning section 28 applies equally to section 23.

See below, pp. 683–84, for further discussion of the *Reference re Public Service Staff Relations Act*.

For a discussion of the views of the Board concerning the line to be drawn between those matters that are, and those that are not, reviewable by a tribunal that has jurisdiction to ascertain whether there is an error of law or jurisdiction, see *Stewart* v. *Treasury Board* (1976) PSSRB file 168–2–108. See also the views of the Federal Court of Appeal in the *Fraser Case*, discussed in Chapter 11, p. 587, above.

61. The subsection was amended in 1975 by deleting the words "the Arbitration Tribunal or" and inserting instead "an arbitrator appointed under section 62 or" (S.C. 1974–75–76, c. 67, s. 29).

62. (1953) S.C.R. 18.

63. R.S.C. 1970, c. 10 (Second Supplement) as amended. To the end of November 1981, there had been 179 references to the Court relating to decisions or awards under the PSSRA, a great many of them concerning decisions of adjudicators. About three quarters of the references were either withdrawn or dismissed, and an appeal was allowed in slightly more than one quarter. Decisions on ten references had not been issued at that date.

64. See, however, the provisions of s. 156 of the Canada Labour Code, as amended by S.C. 1977–78, c. 27, s. 55. The section declares that every order or decision of an arbitrator or arbitration board is final and is not to be questioned or reviewed by any court, that the prerogative writs do not apply to an arbitration proceeding, and that an arbitrator or an arbitration board appointed under a collective agreement is not subject to the review procedure under s. 28 of the Federal Court Act.

65. (1973) F.C. 604 at 615.

66. At 616.

67. For further discussion of this case, see below, pp. 683–84.

68. See below, pp. 683–84, concerning application of this section to the staff of the Pay Research Bureau.

69. (1979) Adjudication files 166–2–5354 and 166–2–5355.

70. *Report of the Preparatory Committee on Collective Bargaining in the Public Service* (Ottawa: Queen's Printer, 1965), p. 8.

71. *Ibid.*, pp. 41–42.

72. See *Reference re Public Service Staff Relations Act* (1973) F. C. 604 at 608–9.

73. P. 80.

74. During the period when the Council of Postal Unions was the certified bargaining agent for many of the employees in the Post Office, the Council did not participate in the activities of the Advisory Committee. Subsequently, when the Council was dissolved and the Letter Carriers Union of Canada was certified as bargaining agent for the 'outside' postal workers, that union became a member of the Advisory Committee and continued its membership until the Canada Post Corporation Act came into force on 16 October 1981. The United Food and Commercial Workers Union has not participated in the workings of the Advisory Committee; it deals with the employer at each of the PX's where it represents a very small number of employees.

75. Mr. Georges E. Gauthier, Vice Chairman of the Board for a number of years, had been the first Director of the Bureau when it was established in 1957.

76. In 1981 a special Committee was set up by the Treasury Board and the Canadian Air Traffic Control Association to examine working credits and wage rates of air-traffic controllers. One of the steps taken by that committee is discussed in Chapter 6, note 22, above.

77. (1974) PSSRB files 148–2–9 and 148–2–10, 168-2–43, 168–2–45 and 168–2–46.

78. *Reference re Public Service Staff Relations Act* (1973) F. C. 604 at 616, 614 and 613.

79. *Ibid.* at 616. In a note to his decision (pp. 616–17), Jackett C.J. said:

> There may well be documents so obtained or prepared that do not contain "information" to which section 107 applies. Indeed, I venture to suggest that the difficulty arises here because the question that the Board itself is being asked to determine under section 23 of its Act has been raised prematurely. I say this because, as I see it, there is nothing in section 107 to prevent a member of the Pay Research Bureau being a witness. It merely acts as a shield against a special class of evidence being given; and, as I see it, the appropriate time to take objection to particular evidence is when such evidence is tendered so that the

tribunal concerned can know what the evidence is and can consider whether such a provision as section 107 or some other rule of law operates to require that it be excluded.

The Special Joint Committee on the *Finkelman Report* (*Sixth Report*, pp. 47:24–47:27) endorsed the work of the Pay Research Bureau and urged the preservation of its independent character under the administrative control of the PSSRB. The Committee also endorsed the continuation of the Advisory Committee on Pay Research. It went on to urge that the Bureau's activities, methodology and information should receive greater publicity and that wherever possible, the Bureau should make its reports available for public distribution.

Bill C–28, which received first reading in 1978 and was not proceeded with, would have given statutory recognition to the Pay Research Bureau, but would have left it under the administrative jurisdiction of the Chairman of the PSSRB. The Bill provided that the data compiled by the Bureau on pay, employee benefits and similar items was to be directed in part to provide information on aggregate compensation as defined in the amendment to subsec. 68(4) discussed in Chapter 10, pp. 443–44, above.

Bill C–22, which received first reading later in 1978, but was not enacted, envisaged a much broader role and set-up for the Pay Research Bureau. The Bill contained, as Part II, a National Pay Research Board Act, which would have provided for the establishment of a National Pay Research Board, independent of the PSSRB. The projected Board was to consist of nine members appointed by the Governor in Council, who would report directly to a Minister designated by the Governor in Council. The objective of the new Board was expressed in terms somewhat different from those that appeared in the earlier Bill. It was to provide the data necessary to support the process of collective bargaining in the public service "in an independent, impartial and fair manner". The powers and duties of the new Board were the same as those set out in the earlier Bill. The Board was to be guided by a Steering Committee appointed in much the same way as had been the practice in the past with regard to the Advisory Committee, but it was to be chaired by one of the members of the Board.

80. T. Jaffray Wilkins, "Wage and Benefit Determination" in *Collective Bargaining in the Public Service* (Toronto: The Institute of Public Administration of Canada, 1973): 77 ff.

14: *Conclusions*

The PSSRA: A Bold Experiment

The enactment of the Public Service Staff Relations Act (PSSRA) in 1967 has been described as a "bold experiment".[1]

> In March 1967, labor-management relations in the public service of Canada entered a new era. . . . In a country whose social and economic policies [had] been stamped with an indelible tone of moderation and whose labor policies [had] hitherto been largely derivative, the new statute [had to] be regarded as profoundly significant.[2]

The new legislation replaced the unilateral system for the determination of most terms and conditions of employment of federal public servants with a bilateral system whereby employees were assured of a large measure of participation in the determination of such terms and conditions. Although many aspects of this system have recently been placed 'on hold' by the Public Sector Compensation Restraint Act (PSCRA), the conclusions and recommendations in this chapter are based on the assumption that that Act will expire in the period provided, and that the collective bargaining regime, as we have come to know it, will be permitted to resume. In fact, we urge the policy makers to give their attention without delay to the problems that have emerged in the light of experience under the PSSRA, in anticipation of the resumption of bargaining on the expiry of the PSCRA.

In assessing the experience under the PSSRA, it is important to bear in mind that both parties had to accommodate themselves to a system that was entirely new at the time the law was enacted. With few exceptions,[8] the parties entered the collective bargaining regime without previous negotiating experience under collective bargaining legislation. Both had to build a cadre of negotiators 'from scratch'. In the early days after the legislation came into force, negotiators for both sides were senior officials who knew one another well; many of them had been involved in establishing the system and had a stake in getting it under way successfully. Before long many of the negotiators on the employer side were recruited from the private sector, as were a large number of managers responsible for administering collective agreements at various levels within departments. Most of these negotiators brought harder-line attitudes to labour-management relations and, consequently, to the bargaining table, than had been brought there in earlier rounds of bargaining. Employee expectations, raised by initial 'catch-up' settlements, were not as easily satisfied in subsequent negotiations. If we add to the very considerable difficulties faced by both parties in adapting to a totally new relationship the fact that most of the negotiations since the early 1970s have been carried on in a difficult economic climate that involved wage restraints, wage controls and, most recently, an economic recession, it is perhaps remarkable that the system has worked as well as it has.

Accomplishments and Concerns

Collective bargaining has, indeed, produced numerous benefits for federal employees. Most of these are reflected in collective agreements; some have been achieved in the National Joint Council. The gains have been made, moreover, without the wheels of government grinding to a halt or the federal treasury becoming bankrupt. Of the occasional disruptions in service that have occurred, a large number have been in the Post Office, where, it should be remembered, strikes were not unknown before the law allowed them. As for wages, few collectively negotiated agreements have produced the advantage over the private sector that some observers predicted they would, and that others still perceive that they have. As we saw in Chapter 8, above, the perception of inflationary settlements in the public sector is based largely on the experience at the provincial level, particularly in the parapublic services. But while the system may have worked well on balance, there clearly are shortcomings in the law and in its application that leave something to be desired. The climate on the eve of the controls legislation gave little ground for complacency. The possible impact of the PSCRA is now cause for further concern.

The suspension, however temporary, of most aspects of the collective bargaining regime that had been established by the PSSRA, the unprecedented interference with collective agreements that have been reached through a process of negotiation, and the bargaining agents' perception that considerations of equity were neglected by their employer, acting as legislator in developing the program, could have serious implications for the long-term relationship between the parties. The restraint program, however justified by economic circumstances, following so soon after the Canadian Air Traffic Control Association (CATCA) case, has created concern in many quarters that "things will never be the same". We urge the parties to do their utmost to ensure that the system survives the current difficulties. It would be a sad day for Canada if this bold experiment in labour relations that has been a model for other jurisdictions were permitted to fail.

Continuity and Change: A Desirable Combination

We have referred throughout this volume to various public inquiries that have dealt, in whole or in part, with labour relations in the federal public service. All the inquiries have concluded that the system is basically sound. None has called into question the right to bargain collectively or even the right to strike. All, however, have made a number of recommendations for change, most of which would require amendments to the law. It is hardly surprising that in the light of experience, some changes would be indicated to a statute which, at the time it was enacted, represented such a highly innovative experiment. What is more surprising is that there have been no amendments of a substantial nature to the PSSRA in the sixteen years it has been in effect. This stands in contrast to the private sector legislation, which has been amended more than once in the same period, as has the public sector legislation in some of the provinces.

Some of the problems that have been identified in this and other studies are of interest primarily to the parties and/or the administrators of the law. Others, in particular dispute resolution, are clearly of concern to the public. Some may be more amenable to solution by legislative amendment than others. Some may be virtually inherent in the system, but may well be alleviated with effort. Examples of problems in the latter category are those related to the political nature of the government employer, the diffuse structure of bureaucratic authority, the size and diversity of the public service and the different interests of the centre and the parts, that is, of Treasury Board and the operating departments; all of these we discussed in Chapter 6, above.

The Need to Amend the Law

Problems that have emerged in administering the law and that indicate a need for statutory amendment have been dealt with in detail in the foregoing chapters, as have some of the recommendations for change made on the basis of various public inquiries. In conclusion, therefore, we shall only highlight the problems that call for most urgent attention. These problems and some general observations and recommendations with respect to them may be summarized under a number of headings.

Bargaining-Unit Structure

The bargaining-unit structure envisaged in the PSSRA and implemented in the original certifications was interesting and innovative at the time and facilitated the rapid development of the system. In practice, however, the multiplicity of bargaining units has become burdensome to the larger bargaining agents, as well as to Treasury Board, since, for all these bodies, bargaining is an almost constant process. There is growing consensus that a reduction in the number of bargaining units would be desirable. For one thing, it would eliminate the duplication of time and effort spent in negotiating similar or identical clauses for inclusion in separate agreements, as presently so often happens. For another, it would reduce the potential for sequential interruptions of service if there is a breakdown in negotiations. As we saw in Chapter 6, above, this has become a matter of some concern to the bargaining agents, as well as to the employer and the public.

There seems to be general agreement that co-ordinated (or coalition) bargaining should be encouraged where possible, particularly on matters of common interest. Negotiations in the National Joint Council are a commendable step in this direction. But some amendments to the law are also in order. It is essential to eliminate any impediments to the consolidation of bargaining units under the existing legislation. The Public Service Alliance has recommended, for example, that the PSSRA be amended to permit a bargaining agent, if it can convince the Public Service Staff Relations Board (PSSRB) that it has the authority of the members concerned, to combine certifications without going through the time-consuming decertification and certification procedures presently required. During these procedures bargaining rights are, for all practical purposes, in limbo. As we noted, however, in Chapter 3, above, some observers have expressed the opinion that consolidation of bargaining units may not be an unmixed blessing. The advantages and disadvantages will have to be weighed carefully by the responsible authorities and by the parties. It would appear to be desirable to give to the Board authority to facilitate the consolidation of bargaining units where it is shown in any particular case that it would be in the public interest to do so.

Bargaining-Unit Exclusions

The present language setting out the criteria for the exclusion of certain persons from the collective bargaining provisions of the legislation has resulted in numerous arguments over technical wording and has led to constant bickering between the parties, as is evident from some of the cases discussed in Chapter 2, above. This situation has engendered suspicion in the minds of bargaining agents that some persons are being classified as persons employed in a managerial or confidential capacity, not because of the functions they perform, but in order to maintain a core of excluded persons to keep an operation going in case of a strike. The manner in which grievance-officer exclusions have been handled by the employer, for example, has reinforced that suspicion. The bargaining agents, on the other hand, have been able to exert undue power to hold up decisions because of built-in delays in the procedure. The issue of exclusions and the procedures for determining them must clearly be addressed by the policy makers.

Scope of Bargaining

As we saw in Chapter 7, above, bargaining agents in the federal public service have succeeded in negotiating many clauses that are standard in the private sector, and they enjoy benefits outside negotiated agreements on a number of other items. They have also achieved some negotiated benefits far ahead of the private sector: maternity and other family-related benefits, severance pay, education leave, and various professional privileges, to mention just a few. Job-security provisions, however, are conspicuous by their absence, because of statutory limitations on the scope of bargaining.

While it is generally agreed that some items must remain outside the ambit of bilateral determination when a government is the employer, the limitations on scope of bargaining under the PSSRA have been recognized as too restrictive by a number of public inquiries; so have the corollary limitations on access to adjudication, particularly in the case of termination of employment. It is clear that the scope of bargaining could be broadened with respect to certain matters presently excluded, without threatening the power of the government to govern and without undermining the 'merit principle'. Other limitations must remain. We suggest that consideration be given to bringing within the bargaining arena, in some form, some aspects of the authority that now lies within the jurisdiction of the Public Service Commission and the Treasury Board. These aspects might include, but should not be limited to, *criteria* for lay-off, technological change, classification standards and performance evaluation.

Grievances and Adjudication

If the scope of bargaining were broadened, as recommended above, the opportunity to file grievances and, more particularly, to carry them to adjudication, would be considerably enlarged. It is clear that the system must be capable of handling all legitimate complaints, and that it must be perceived to have this capability by the employees concerned if a better climate of labour relations is to be achieved. The question of access to adjudication becomes particularly acute in the case of termination of employment. As we saw in Chapter 11, above, the reason for termination, as defined by the employer, in some instances determines the recourse available. On a matter of such vital importance to an employee, the present system can be confusing, expensive and unfair. The relevant statutes should be amended to make all cases of termination of employment subject to the same process, that is, adjudication by the PSSRB.

As we saw earlier, the refusal by the Canadian Union of Postal Workers (CUPW) to consolidate grievances placed excessive pressure on the adjudication machinery. Although CUPW is no longer part of the public service, there are lessons to be learned from this experience. Accordingly we recommend that the PSSRA be amended to provide for class actions when grievances require a declaratory decision. This recommendation applies to grievances over the interpretation of an agreement, as distinct from cases of remedial action.

The Resolution of Interest Disputes

With the establishment of Canada Post as a Crown corporation, the source of some of the highest-profile labour disputes has been removed from the public service. Whether the problems reflected in these disputes will be more amenable to solution under the Canada Labour Code, only time will tell. Whether the departure of the Post Office from the federal public service will mean fewer problems in this sector, or whether other problems will arise to fill the gap they leave, again, only time will tell. There is surely no shortage of problems at the moment or for the foreseeable future. The question of dispute resolution has been paramount among these problems and will undoubtedly remain so when the PSCRA, which has temporarily suspended the right to strike, ceases to have effect.

It will be remembered that the initial choice of impasse procedures inclined heavily in favour of the arbitration option, as the policy makers had expected and hoped. That a significant number of bargaining units have since switched their original option, with the result that the majority of employees in the federal public service are presently committed to the conciliation-board route, indicates that the confidence in arbitration was short lived. The present climate shows signs of a steady, perhaps even dramatic, trend towards militancy in groups where such a development might originally have been expected least. Wages have been eroded by inflation, fears for job security have increased and, probably most important, more militant groups seem to have achieved better settlements. Under these circumstances, when the normal collective bargaining regime was still in effect, even the most traditionally docile groups seemed to be deciding, with the encouragement of some new leaders, that the time for a change in tactics had come. The placards carried by pickets in the clerical and regulatory strike were symbolic at the time; they may also have been prophetic. They declared that "the worm has turned".

During 1981 a movement began among bargaining units represented by the Professional Institute of the Public Service (PIPS), most of which were still on the arbitration option, to alter their specification of dispute-resolution method. As we saw in Chapter 10, above, the argument supporting this development was that there would be no need for the employees to resort to a full-scale strike; pressure could be exerted on the employer through rotating strikes. The Public Service Alliance of Canada (PSAC) has, for some time, been encouraging switches to the conciliation-board option, a position confirmed at its most recent convention. Perhaps the more militant stance of the bargaining agents in the past few years is in response to, or has helped to provoke, a harder-line employer position, or perhaps the harder-line positions of both parties, in turn, reflect external economic conditions. Whichever alternative applies, the fact is that the battle lines have recently seemed to be more clearly drawn, in certain cases at least, than they had been in the past. While some people have deplored this fact as an indication of deteriorating labour-management relationships, others believe it reflects a 'coming of age' of labour relations in the public service and that, for this reason, it is a healthy sign. But it raises some serious policy problems for the post-control period, problems the policy makers would do well to address in advance. For while the PSCRA may postpone the consequences that flow from this development, there is a strong possibility that a high level of militancy will characterize the relationship between the parties once the restraint period has come to an end. It would be a serious mistake to put the problem of dispute resolution aside for consideration at some distant future date.

We believe that the movement away from the arbitration option is regrettable. We urge the policy makers to make every effort to halt, or preferably reverse, the trend. The goal must be to make the arbitration option more palatable to the bargaining agents, and to do so in time for the resumption of bargaining when the PSCRA ceases to have effect. The option must not only be fair, but be *perceived* by them to be fair. As a step in this direction, we propose that the scope of arbitration be broadened to bring it into line, as far as possible, with the scope of matters that are bargainable. This course would meet at least one of the bargaining agents' major criticisms.

One of the very serious policy problems that has been identified in the area of dispute resolution flows from the 'designation' provision which, as the *quid pro quo* for the right to strike, was one of the most innovative features of the PSSRA. The parties have differed from the outset about the number of employees to be designated in particular circumstances and the tasks that designated employees should be required to perform. It has also become apparent, in the light of experience, that there are deficiencies in the designation provision. This appears, in particular, in the rather narrow definition of the services to be protected and the lengthy procedure for designation. These deficiencies clearly call for amendments to the law. However, in spite of deficiencies in the legislation and differences concerning its application, it appeared until recently that a *modus vivendi* had been reached that was reasonably acceptable to both sides.

The PSSRB has always been faced with a difficult task in interpreting and applying the designation provision. As we have seen, it declared at the very outset that if it erred at all, it preferred to do so on the side of caution; that is, it would lean towards designation. Indeed, since 1978[4] the Board has gone beyond the strict literal language of the law by holding that certain social services, such as the services of clerks processing welfare and welfare-related cheques, fell within the phrase 'the safety or security of the public'.

The recent case concerning the air-traffic controllers is the first instance where the employer has seriously questioned the policy on which the Board has based its decisions on designation. The CATCA case, discussed in detail in Chapter 10, above, appears to reflect a significant change in the employer's philosophy about the right to strike in certain services. In this case the employer used the designation procedure to implement a change in policy rather than making the change openly by the introduction of an amendment to the law, which would have called for debate in Parliament on the principle involved. Such discussion did take place in connection with the Air Services Continuation Act in 1977 and the Postal Services Continuation Act in 1978. The CATCA case has complicated the already difficult task faced by the PSSRB in interpreting and applying the designation provision. It is unlikely that the decisions of the

Federal Court of Appeal and of the Supreme Court of Canada in this case will finally resolve the issue. It is imperative, in our view, that policy with respect to the right to strike and, of course, the designation principle, and the law with respect to that policy be clarified at the earliest opportunity. Again, if the policy prevails on which the government seems to have embarked, it is of the utmost importance that a bargaining agent be permitted to alter its option from reference to a conciliation board to reference to arbitration at any stage of the process. Otherwise, if a large number of employees are designated, and the capacity of a bargaining agent to conduct an effective legal strike is destroyed, that bargaining agent would be deprived of any effective method in law for resolving an impasse in bargaining.

It is clear that the whole question of essential services requires the policy makers' urgent attention. It is important to note, moreover, that the issue is not confined to government employment. It should be addressed in the general labour legislation as well, as it has been already in some jurisdictions.

Finally, on the subject of dispute resolution, it has become clear, in the light of experience, that the public employer should have the right to lock out employees as a counterpart to the employees' right to strike. This issue first came to the fore in the federal public service with rotating strikes in the Post Office. Mail service was virtually paralysed at minimal cost to the union. As we saw earlier, other bargaining agents may now be suggesting similar tactics. The bargaining agents cannot have it both ways.

Unfair Practices

Delays and inconsistency in dealing with non-compliance with the law can only be counter-productive. Accordingly, it is our view that all offences under the legislation should be handled by the PSSRB. The delays encountered in seeking leave to prosecute, as required by the present legislation, and the inconsistent handling of cases by provincial judges, who find the procedure distasteful, are reason to keep these matters in the hands of the Board. The nominal fines imposed by the courts following interminable proceedings have not been a deterrent in such cases. Not that we are suggesting substantial minimum fines. Circumstances have to be taken into account in each instance. We are convinced that the Board is in the best position to understand the issues involved and to judge the circumstances of each case.

The employer's reluctance in the past — and, indeed, until fairly recently — to seek enforcement of the provisions of the PSSRA relating to unlawful strikes, especially those in which designated employees have engaged, has encouraged some employees to flout the law. Designated employees or their fellow employees in the same unit must accept without reservation the fact that, but for the designation principle, the right to strike would never have been granted them. In some instances where the employer has sought leave to prosecute or to impose disciplinary action in case of a strike, there has been a long delay between the occurrence of the alleged offence and the initiation of the appropriate proceedings or action. Such delays can only serve to cause acrimony when the 'offence' seems to have been 'forgiven'. There may be valid explanations for the delays, but if so, the reasons should be made public.

Although there may be little evidence that bargaining agents have not dealt fairly with the members of the units they represent in presenting their grievances, since some question has now arisen of whether a duty of fair representation does exist, it should be expressly guaranteed in the legislation.

The Need for Consistent Management Practices

Some of the problems that have emerged and been dealt with in the foregoing chapters are not amenable to solution by changes in the law. A few, however, require the policy makers' serious attention. Inconsistencies in policy and practice, in particular, can undermine the credibility of the system and damage the relationship between the parties. Examples are not hard to find at the negotiating stage. The perception by the bargaining agents of different treatment for different groups, depending on the clout they wield, is not conducive to a healthy bargaining climate. The need for consistency, and for a perception of consistency by those affected, cannot be overemphasized. The same is true for the administration of the agreement.

It is evident that the provisions of a collective agreement are not interpreted in uniform style throughout the public service. The difficulty of applying a centrally negotiated agreement in far-flung locations and different departments calls for far greater co-ordination of policy than presently exists. We recommend that as soon as a collective agreement is signed, the employer undertake a more comprehensive program of education than it has undertaken heretofore. Managers responsible for labour relations should be instructed in the meaning of the collective agreement; they should, in fact, be brought together to discuss its meaning, particularly with respect to disciplinary matters. Inconsistent standards of discipline and lack of consistency in the enforcement of discipline can only be counterproductive. The same criticism applies to the rigid application of disciplinary procedures, frequently made on the basis of Treasury Board directives, without regard for local circumstances. Both errors of administration should be avoided. Managers must be able to combine consistency and flexibility so that a satisfactory relationship can develop. An ongoing educational program should have as its goal the training of labour-relations managers with sufficient knowledge of government policy to apply that policy consistently, and sufficient understanding of human relations to be flexible where circumstances warrant.

Notes

1. H.W. Arthurs, "Collective Bargaining in the Public Service of Canada: Bold Experiment or Act of Folly?" 67 *Michigan Law Review* (1969): 971.
2. H.W. Arthurs, *Collective Bargaining by Public Employees in Canada: Five Models* (Ann Arbor: Institute of Labor and Industrial Relations, University of Michigan — Wayne State University, 1971), p. 19.
3. The exceptions were the International Brotherhood of Electrical Workers, Canadian Merchant Service Guild, the *Syndicat Général du Cinéma et de la Télévision*, and the unions that composed the Council of Graphic Arts Unions and the Federal Government Dockyards Trades and Labour Council. The members of these unions, taken together, represented a fraction of the employees in the public service.
4. See, above, Chapter 10, pp. 503–5.

Tables

Table 1: *Employment in the Public and Private Sectors, 1974–1981*[1]

	1974	*1975*	*1976*	*1977*	*1978*	*1979*	*1980*	*1981*
Federal Government:								
General Government[2]	394 815	405 809	444 321	448 656	438 342	423 028	432 924	440 472
Government Enterprises[3]	135 879	132 046	131 843	140 374	143 158	153 798	164 235	155 084
Provincial Government:								
General Government[4]	320 038	330 939	336 461	349 220	348 837	390 250	320 747	314 760
Government Enterprises[5]	120 724	136 675	137 510	144 319	153 070	148 347	148 460	153 528
Local Government:[6]								
General Services	236 892	247 199	253 668	267 602	266 613	267 301	280 571	283 870
Non-Commercial Sector (Public):								
Education[7]	573 067	591 132	607 429	625 842	630 279	632 255	642 430	675 270
Health and Welfare[8]	502 820	524 370	525 792	528 097	538 739	552 572	531 170	558 330
Total Public Sector	2 284 235	2 368 170	2 437 024	2 504 110	2 519 038	2 567 551	2 520 937	2 581 314
Total Employed Labour Force (Private and Public)[9]	9 805 940	10 079 229	10 205 112	10 566 546	10 952 425	11 245 512	11 601 000	11 910 000
Total Public as a Percentage of Employed Labour Force	23.3	23.5	23.9	23.7	23.0	22.8	21.7	21.6

Notes:

1. Statistics Canada, *Federal Government Employment*, Cat. No. 72–004; *Provincial Government Employment*, Cat. No. 72–007; *Local Government Employment*, Cat. No. 72–009; *Estimates of Employees by Province and Industry*, Cat. No. 72–008; *Historical Labour Force Statistics*, Cat. No. 71–201; some unpublished statistics courtesy of Labour Canada and Pay Research Bureau. Figures for 1980 and 1981 are preliminary estimates.
2. Includes government departments, departmental corporations, armed forces and special funds (which include quasi-independent agencies such as the Bank of Canada, Atomic Energy of Canada, National Film Board, etc.), also Christmas helpers in the Post Office.

3. "A government enterprise is an organized entity, usually corporate, which (a) is established by a political decision-making body to produce goods and/or services for sale on the open market at a price related to costs, (b) maintains an independent system of accounts . . . that permits the charging of specific elements of costs against the revenue derived from its sales of goods and/or services, (c) has a relatively autonomous management in the conduct of day-to-day operations, and (d) is staffed by personnel not normally subject to the statutory requirements governing employment in the general public service." (Statistics Canada, *The Canadian System of Government Financial Management Statistics*, Cat. No. 68–506.) Federal government enterprises include entities such as Air Canada, Canadian National, Canadian Broadcasting Corporation, Canadian Wheat Board, and Canada Mortgage and Housing Corporation.
4. Includes government departments, administrative, regulatory and special funds, government-owned and financially supported institutions (engaged in education, health and welfare services, and in the administration of justice).
5. Includes provincially owned hydro-electric commissions, telephone companies, and so forth.
6. Includes general services of municipalities, metropolitan corporations, regional municipalities and counties in Ontario and regional districts in British Columbia.
7. To avoid double counting, this figure excludes an estimated number of employees engaged in education services who are already included in the figures on government employment.
8. As with education, this figure excludes an estimated number of employees engaged in health and welfare services who are already included in the figure on government employment.
9. *Historical Labour Force Statistics* adjusted to include the armed forces.

Table 2: *Wages and Salaries in the Public and Private Sectors, 1974–1981 ($000)*[1]

	1974[2]	*1975*	*1976*	*1977*	*1978*	*1979*	*1980*	*1981*
Federal Government:								
General Government	4 280 953	5 029 602	6 143 079	6 494 993	7 038 415	7 527 808	10 832 112	8 091 578
Government Enterprises	1 734 550	1 880 851	2 085 768	2 327 764	2 562 238	3 012 130	3 464 648	3 564 989
Provincial Government:								
General Government[3]	3 388 163	4 158 438	4 907 167	5 487 509	6 034 503	6 050 343	6 564 601	7 355 442
Government Enterprises	1 400 201	1 829 714	2 122 874	2 469 079	2 834 521	3 058 196	3 640 029	4 135 386
Local Government:								
General Services	2 055 285	2 449 648	2 854 567	3 332 892	3 617 061	3 945 688	4 449 619	5 054 412
Non-Commercial Sector:								
Education	6 075 864	7 131 695	8 698 824	9 969 102	11 053 933	11 975 152	13 464 150	15 458 400
Health and Welfare	3 842 841	4 766 187	5 765 131	6 364 015	6 990 904	7 660 477	8 968 800	10 411 200
Total Public Sector	22 777 857	27 242 135	32 576 410	36 445 354	40 131 575	43 229 794	51 383 959	55 071 407
Total Private and Public Sectors	74 716 827	86 971 153	100 339 989	110 399 101	120 114 179	133 239 000	138 017 050	155 386 800
Total Public as Percentage of Total Private and Public	30.49	31.32	32.47	33.01	33.41	32.45	37.23	35.44

Notes:

1. Statistics Canada, *Federal Government Employment*, Cat. No. 72–004; *Provincial Government Employment*, Cat. No. 72–007; *Local Government Employment*, Cat. No. 72–009; *Estimates of Labour Income*, Cat. No. 72–005. Figures for 1980 and 1981 are preliminary estimates.

   The figures in this table do not include "supplementary labour income". See Chapter 1, note 2 for a discussion of supplementary labour income as a percentage of wages and salaries.
2. This table begins with the year 1974, when the method now in use for computing wage data was adopted. Figures for years prior to 1974 would not be directly comparable.
3. Figures for British Columbia became available for the first time in 1979. The figures for the item 'Provincial Government: General Government' were therefore adjusted by including in the item for the years 1974–1978 an estimated amount based on the proportion of the total figure attributable to British Columbia in 1979.

Table 3: *Percentage Distribution by Sector of Collective Agreements Covering 500 Employees or More and Employees Covered by These Agreements, 1967 – 1981*[1]

	Number of Agreements		*Number of Employees*	
Year	*Private*	*Public*	*Private*	*Public*
1967	86.1	13.7	85.7	14.3
1968	84.7	15.3	81.7	18.3
1969	79.7	20.3	69.7	30.3
1970	76.4	23.6	63.6	36.4
1971	74.0	26.0	62.1	37.9
1972	72.0	28.0	59.8	40.2
1973	70.3	29.7	56.5	43.5
1974	70.4	29.6	55.1	44.9
1975	69.3	30.7	55.5	44.5
1976	65.3	34.7	54.2	45.8
1977	62.0	38.0	50.3	49.7
1978	61.2	38.8	49.9	50.1
1979	60.3	39.7	50.1	49.9
1980	59.4	40.6	49.5	50.5
1981	59.4	40.6	50.1	49.9

Notes:

1. Labour Canada, Collective Bargaining Division, *Wage Developments*, Annual Review.
   It should be noted, in interpreting the following figures, that the above publication provides a breakdown on the basis of 'non-commercial' industries and 'others', rather than on the basis of 'public' and 'private' sectors, as these terms have been used in the text of Chapter 1 and in other tables relating to this chapter. The 'non-commercial' category, treated as 'public' in this table, includes, in addition to public administration and defence, such enterprises as highway and bridge maintenance, water systems and other utilities, hospitals, welfare organizations, religious households, and education and related services.

Table 4: *Departments and Portions of the Public Service Subject to the Public Service Staff Relations Act (PSSRA)*[1]

Departments and other Portions of the Public Service for which Her Majesty as represented by the Treasury Board is the Employer:

1. **Departments named in Schedule A to the Financial Administration Act and listed in Part I of Schedule I of the PSSRA:**[2]
   - **Agriculture**
   - **Communications**
   - **Consumer and Corporate Affairs**
   - **Employment and Immigration**
   - **Energy, Mines and Resources**
   - **Environment**
   - **External Affairs**
   - **Finance**
   - **Fisheries and Oceans**
   - **Indian Affairs and Northern Development**
   - **Industry, Trade and Commerce**
   - **Insurance (Minister of Finance)**
   - **Justice**
   - **Labour**
   - **National Defence**
   - **National Health and Welfare**
   - **National Revenue**

- **Public Works**
- **Regional Economic Expansion**
- **Supply and Services**
- **Secretary of State**
- **Solicitor General**
- **Transport**
- **Treasury Board**
- **Veterans Affairs**

2. **Other portions of the Public Service named under Part I of Schedule I of the PSSRA:[3]**
   - **Agricultural Stabilization Board**
   - **Anti-Inflation Appeal Tribunal**
   - **Anti-Inflation Board**
   - **Atlantic Development Board (incorporated in National Development Council)**
   - **Bureau of Pensions Advocates**
   - **Canada Labour Relations Board**
   - **Canadian Dairy Commission**
   - **Canadian Grain Commission**
   - **Canadian Human Rights Commission**
   - **Canadian Intergovernmental Conference Secretariat**
   - **Canadian International Development Agency**
   - **Canadian Livestock Feed Board**
   - **Canadian Penitentiary Service**
   - **Canadian Pension Commission**
   - **Canadian Radio-television and Telecommunications Commission**
   - **Canadian Transport Commission**
   - **Defence Research Board (incorporated in National Defence)**
   - **Director of Soldier Settlement**
   - **The Director, Veterans' Land Act**
   - **Federal-Provincial Relations Office**
   - **Fisheries and Oceans Research Advisory Council**
   - **Fisheries Prices Support Board**
   - **Government Printing Bureau**
   - **Immigration Appeal Board**
   - **International Joint Commission (Canadian Section)**
   - **The Law Reform Commission of Canada**
   - **Maritime Marshland Rehabilitation Administration**
   - **Ministry of State for Economic Development**
   - **Ministry of State for Science and Technology**
   - **Ministry of State for Social Development**
   - **Municipal Development and Loan Board**
   - **National Capital Commission**
   - **National Energy Board**
   - **National Library**
   - **National Museums of Canada**
   - **National Parole Board**
   - **Office of the Chief Electoral Officer**
   - **Office of the Commissioner for Federal Judicial Affairs**
   - **Office of the Commissioner for Official Languages**
   - **Office of the Co-ordinator, Status of Women**
   - **Office of the Governor-General's Secretary**
   - **Office of the Superintendent of Bankruptcy**
   - **Pension Review Board**
   - **Prairie Farm Assistance Administration**
   - **Prairie Farm Rehabilitation Administration**

- Privy Council Office
- Public Archives
- Public Service Commission
- Restrictive Trade Practices Commission
- Royal Canadian Mounted Police[4]
- Staff of the Federal Court
- Staff of the Supreme Court
- Statistics Canada
- Statute Revision Commission
- Tariff Board
- Tax Review Board
- War Veterans' Allowance Board

Portions of the Public Service named under Part II of Schedule I of the PSSRA (Separate Employers):[5]

- Atomic Energy Control Board
- Communications Security Establishment (Department of National Defence)
- Economic Council of Canada
- Medical Research Council
- National Film Board
- National Research Council of Canada
- Natural Sciences and Engineering Research Council
- Non-Public Funds (Canadian Forces, Staff of)
- Northern Canada Power Commission
- Northern Pipeline Agency
- Office of the Auditor General of Canada
- Public Service Staff Relations Board
- Science Council of Canada
- Social Sciences and Humanities Research Council

Notes:

1. The material in this table was derived from PSSR Reports C-96–C-99 as revised on the basis of information supplied by the staff of the Treasury Board. The table reflects the situation as of 1 September 1981. For the departments and portions of the federal public service originally named in Schedule A to the Financial Administration Act, see S.C. 1966–67, c. 25; for those originally named in Schedule A (now Schedule I) to the Public Service Staff Relations Act, see S.C. 1966–67, c. 72.
2. Other portions of the Public Service have been designated as departments for the purposes of the Financial Administration Act pursuant to s. 2 of the Act and fall under Schedule A to that Act. Some of these are specifically named in Schedule I to the PSSRA and are listed in Part 2 of this table. Others, such as various inquiry commissions, are not listed in this table because they are not of an ongoing nature.
3. Some of the portions of the public service in this group exist as legislatively authorized bodies with statutory responsibilities, but their staffs are provided for, integrated with, and accounted for by a department listed among the departments named in Schedule A to the Financial Administration Act.

   The following portions of the Public Service have been deleted from Part I of Schedule I:

   - Air Transport Board
   - Board of Broadcast Governors
   - Board of Grain Commissioners
   - Board of Transport Commissioners for Canada
   - Canadian Government Elevators
   - Canadian Maritime Commission
   - Dominion Coal Board
   - Feed Grain Administration
   - Ministry of State for Urban Affairs
   - National Gallery of Canada
   - Office of the Administrator, Anti-Inflation Act
   - Office of the Auditor General of Canada

- Office of the Comptroller of the Treasury
- Public Service Staff Relations Board
- Royal Canadian Mint
- Unemployment Insurance Commission

In some instances the deletion of a portion of the Public Service from Part I of Schedule I is the result of a change of name or the replacement of that portion by another portion. The Post Office Department, previously listed in Part I of Schedule I, was deleted with the enactment of the Canada Post Corporation Act.

Although the Public Service Staff Relations Board was originally listed in Part I of Schedule A (now Schedule I) of the PSSRA, it was later deleted from that Part and added to Part II in order to demonstrate that in the establishment of terms and conditions of employment for its employees, it was not subject to the Treasury Board.

4. In so far as the civilian personnel of the Force is concerned, see Chapter 2, note 20, above.
5. The following have been deleted from Part II of Schedule I:
   - Centennial Commission
   - Defence Research Board
   - Fisheries Research Board

Table 5: *Number of Employees in the Public Service*[1]

1. Employees working in departments and agencies listed under Schedule I, Part I of the Public Service Staff Relations Act, by category of employment:

Indeterminate Full-Time	250 041
Indeterminate Part-Time	9 561
Seasonal Full-Time	2 660
Seasonal Part-Time	90
Term greater than 6 months: Full-Time	25 230
Term greater than 6 months: Part-Time	3 458
Term less than 6 months: Full-Time	15 854
Term less than 6 months: Part-Time	626
Term — Period not specified: Full-Time	184
Term — Period not specified: Part-Time	241
Unknown category of employment	138
Total, all categories of employment	308 083

2. Employees of Separate Employers:
As of August 1981, there were 6494 employees reported by 12 out of 13 separate employers on the Incumbent System.

The Northern Canada Power Commission, which does not report to this system, showed 332 planned continuing employees on 31 March 1981 in the 1981–82 Estimates.

Note:

1. Compensation and Data Services, Treasury Board Secretariat, October 1981.

Table 6:[1] *Equivalent Number*[2] *of Individuals Working on Contract in the Public Service Under the PSSRA (Schedule I, Part I)*

September 1978	3 283
March 1979	3 900
September 1979	3 614
March 1980	4 293
September 1980	3 423
March 1981	4 017

Notes:

1. Compensation Analysis, Staff Relations and Compensation Division, Treasury Board Secretariat, 26 November 1981.
2. It is not technically feasible to count individuals on contract at given points in time. The equivalent counts given above are determined by dividing the person/day usage during each of the months shown by the number of working days in that month. The data base for person/day usage consists of: (*a*) contracts with organizations, (*b*) contracts with individuals, (*c*) contracts with temporary help agencies.

Table 7: *Statistics on Strength and Managerial and Confidential Exclusions as of September 1981*[1]

Occupational Category	*Including the Post Office Department*			*Excluding the Post Office Department*		
	Strength	*M & C Excluded*	*% M & C Excluded Over Strength*	*Strength*	*M & C Excluded*	*% M & C Excluded Over Strength*
Senior Executive	1 509	—	—	1 475	—	—
Scientific and Professional	21 975	2 464	11.2	21 890	2 453	11.2
Administrative and Foreign Service	54 919	8 205	14.9	52 390	7 800	14.9
Technical	27 825	812	2.9	27 635	810	2.9
Administrative Support	81 382	5 850	7.2	78 051	5 344	6.8
Operational	119 439	409	0.3	54 076	315	0.6
Total	307 049	17 740	5.8	235 517	16 722	7.1

Note:

1. Compensation Analysis, Staff Relations and Compensation Division, Treasury Board Secretariat, November 1981.

Table 8: ***Occupational Categories, Occupational Groups, Bargaining Units, Population of Bargaining Units, Bargaining Agents, Affiliation of Bargaining Agents, and Specification of Dispute-Resolution Process***[1]

Bargaining Unit[2]	*Bargaining Agent*[3]	*Estimated Number of Employees*[4]	*Dispute-Resolution Process Specified*
	Treasury Board as Employer		
Scientific and Professional Category:			
Actuarial Science	PIPS[5]	19	Arbitration
Agriculture	PIPS	294	Arbitration
Architecture and Town Planning	PIPS	326	Arbitration
Auditing	PSAC[6]	2 554	Arbitration
Biological Sciences	PIPS	869	Arbitration
Chemistry	PIPS	363	Arbitration
Defence Scientific Services[7]	PIPS	486	Conciliation Board
Dentistry	PIPS	49	Arbitration
Economics, Sociology and Statistics	ESSA[8]	2 043	Arbitration
Education	PSAC	2 922	Arbitration[9]
Engineering and Land Survey	PIPS	7 457	Arbitration
Forestry	PIPS	85	Arbitration
Historical Research	PIPS	259	Arbitration[10]
Home Economics	PIPS	36	Arbitration
Law	PIPS	37	Arbitration
Library Science	PSAC[11]	398	Conciliation Board[12]
Mathematics	PIPS	112	Arbitration
Medicine	PIPS	227	Arbitration
Meteorology	PIPS	509	Conciliation Board[13]
Nursing	PIPS	1 522	Conciliation Board[14]
Occupational and Physical Therapy	PIPS	31	Conciliation Board[15]
Pharmacy	PIPS	66	Arbitration
Physical Sciences	PIPS	596	Arbitration
Psychology	PIPS	84	Conciliation Board[16]
Scientific Regulation	PIPS	431	Arbitration[17]
Scientific Research	PIPS	1 914	Arbitration[18]
Social Work	PIPS	153	Conciliation Board[19]
Veterinary Science	PIPS	551	Conciliation Board[20]
Administrative and Foreign Service Category:			
Administrative Services	PSAC	6 190	Arbitration
Commerce	PIPS	1 605	Arbitration
Computer Systems Administration	PIPS	2 138	Conciliation Board[21]
Financial Administration	PSAC	2 113	Arbitration
Foreign Affairs	PAFSO[22]	941	Arbitration
Information Services	PSAC	882	Arbitration
Programme Administration	PSAC	21 821	Arbitration[23]
Purchasing and Supply	PSAC	1 506	Arbitration
Translation	CUPTE[24]	1 076	Conciliation Board[25]
Welfare Programmes	PSAC	1 534	Arbitration
Technical Category:			
Aircraft Operations	CUPTE[26]	418	Conciliation Board[27]
Air-Traffic Control	CATCA[28]	2 100	Conciliation Board[29]
Drafting and Illustration	PSAC	1 847	Arbitration

Educational Support[30]	PSAC	95	Arbitration
Electronics	IBEW[31]	2 974	Conciliation Board
Engineering and Scientific Support	PSAC	7 457	Conciliation Board[32]
General Technical	PSAC	2 373	Arbitration
Photography	PSAC	175	Arbitration[33]
Primary Products Inspection	PSAC	2 690	Conciliation Board[34]
Radio Operations	CUPTE[35]	1 140	Conciliation Board[36]
Ships Officers	CMSG[37]	1 354	Conciliation Board[38]
Social Science Support	PSAC	1 796	Arbitration
Technical Inspection	PSAC	1 228	Arbitration
Administrative Support Category:			
Clerical and Regulatory[39]	PSAC	47 367	Conciliation Board[40]
Communications	PSAC	787	Conciliation Board[41]
Data Processing	PSAC	3 005	Conciliation Board[42]
Office Equipment	PSAC	462	Arbitration
Secretarial, Stenographic and Typing	PSAC	11 420	Arbitration
Operational Category:			
Correctional, Supervisory[43]	PSAC	354	Conciliation Board[44]
Correctional, Non-Supervisory[43]	PSAC	4 057	Conciliation Board[44]
Firefighters, Supervisory[45]	PSAC	123	Arbitration[46]
Firefighters, Non-Supervisory[45]	PSAC	1 333	Arbitration[46]
General Labour and Trades, Supervisory[47]	PSAC	3 208	Conciliation Board[48]
General Labour and Trades, Non-Supervisory[47]	PSAC	15 821	Conciliation Board[48]
General Services, Supervisory[49]	PSAC	1 931	Conciliation Board[50]
General Services, Non-Supervisory[49]	PSAC	10 394	Conciliation Board[50]
Heating, Power and Stationary Plant Operations, Supervisory[51]	PSAC	190	Conciliation Board[52]
Heating, Power and Stationary Plant Operations, Non-Supervisory[51]	PSAC	2 308	Conciliation Board[52]
Hospital Services, Supervisory[53]	PSAC	152	Conciliation Board[54]
Hospital Services, Non-Supervisory[53]	PSAC	2 192	Conciliation Board[54]
Lightkeepers, Supervisory[55]	PSAC	197	Arbitration
Lightkeepers, Non-Supervisory[55]	PSAC	256	Arbitration
Postal Operations, Supervisory[56]	APOC[56]	4 147	Arbitration
Postal Operations, "Inside Workers"[56]	CUPW	23 328	Conciliation Board
Postal Operations, "Outside Workers"[56]	LCUC	20 306	Conciliation Board
Postal Operations, Railway Mail Clerks[56]	PSAC	29	Arbitration
Printing Operations, Supervisory	PSAC	90	Arbitration
Printing Operations, Non-Supervisory	CGAU[57]	1 088	Conciliation Board
Revenue Postal Operations[58]	CPAA[59]	8 211	Conciliation Board[60]
Ship Repair (East Coast)[61]	FGDTLC (East)	1 630	Conciliation Board
Ship Repair (West Coast)[61]	FGDTLC (Esquimault, B.C.)	936	Conciliation Board
Ships Crews, Supervisory[62]	PSAC	507	Conciliation Board
Ships Crews, Non-Supervisory[62]	PSAC	2 188	Conciliation Board[63]

Office of the Auditor General of Canada as Employer[64]

Scientific and Professional Category:			
Auditing and Library Science	PSAC	126	Arbitration
Administrative and Foreign Service Category:			
Administrative Services, Financial Administration, and Purchasing and Supply	PSAC	69	Arbitration
Administrative Support Category:			
Clerical and Regulatory and Secretarial, Stenographic and Typing	PSAC	69	Arbitration
Operational Category:			
General Labour and Trades and General Services	PSAC	5	Conciliation Board

Northern Canada Power Commission as Employer

Operational Category:			
Operational Category, Non-Supervisory	PSAC	144	Conciliation Board[65]

National Research Council as Employer[66]

Scientific and Professional Category:			
Librarians	PIPS	57	Conciliation Board[67]
Research Officers and Research Council Officers	PIPS	931	Conciliation Board[68]
Administrative and Foreign Service Category:			
Administrative Services	RCEA[69]	31	Arbitration
Computer Systems Administration	RCEA	55	Arbitration
Information Services	PIPS	32	Arbitration
Purchasing and Supply	RCEA	23	Arbitration
Translation	PIPS	5	Conciliation Board[70]
Administrative Support Category:			
Clerical and Regulatory and Office Equipment	RCEA	357	Arbitration
Data Processing	RCEA	19	Arbitration
Secretarial, Stenographic and Typing	RCEA	107	Arbitration
Technical Category:			
Technical Category	RCEA	944	Arbitration
Operational Category:			
Supervisory	RCEA	31	Arbitration
Non-Supervisory	RCEA	253	Arbitration

Communications Security Establishment — Department of National Defence as Employer[71]

Scientific and Professional Category:			
Professional Engineers	PSAC	19	Arbitration
Administrative and Foreign Service Category:			
Administrative and Foreign Service Category	PSAC	332	Arbitration
Administrative Support Category:			
Operators	PSAC	50	Arbitration
Non-Operators	PSAC	95	Arbitration

Technical Category:			
Technical Category	PSAC	72	Arbitration
Operational Category:			
Operational Category	PSAC	20	Arbitration[72]
National Film Board as Employer			
Administrative and Foreign Service Category:			
Administrative and Foreign Service Category	PIPS	159	Conciliation Board[73]
Administrative Support Category:			
Administrative Support Category	SGCT[74]	226	Arbitration
Technical Category:			
Technical Category	SGCT	440	Arbitration
Operational Category:			
Operational Category	SGCT[75]	77	Arbitration
Staff of the Non-Public Funds, Canadian Forces as Employer[76]			
Administrative Support Category:			
Administrative Support Category, CFB Kingston	PSAC	12	Arbitration[77]
Administrative Support Category, CFB Petawawa	PSAC	14	Arbitration
Administrative Support Category, CFB Chatham	UFCWU[78]	5	Arbitration
Operational Category:			
Operational Category, CFB Petawawa	PSAC	135	Arbitration
Operational Category, CFB Cornwallis	UFCWU[78]	100	Arbitration
Operational Category, CFB Valcartier	PSAC	148	Conciliation Board
Operational Category, CFB Shilo	MFCW[79]	11	Arbitration
Operational Category, CFB Greenwood	UFCWU	96	Arbitration
Operational Category, CFB Gagetown	UFCWU	101	Arbitration
Operational Category, CFB Chatham	UFCWU	34	Arbitration
Social Sciences and Humanities Research Council as Employer[80]			
Scientific and Professional Category:			
Economics, Sociology, and Statistics	PSAC	2	Conciliation Board
Administrative and Foreign Service Category:			
Administrative Services, Financial Services, Information Services, Programme Administration and Grants Programme Officers	PSAC	46	Conciliation Board
Administrative Support Category:			
Clerical and Regulatory, Secretarial, Stenographic and Typing and Data Processing	PSAC	39	Arbitration

Notes:

1. The information in this table was extracted from *Annual Reports* of the PSSRB, supplemented by information supplied by the staff of the Board. Unless otherwise indicated, this information is as of 1 September 1981.

The Defence Research Board and the Fisheries Research Board were named as separate employers in Schedule I to the Public Service Staff Relations Act (PSSRA) as originally enacted. Subsequently they were transferred to Part I of the Schedule by SOR/74-129 and SOR/70-118 and SOR/71-349 respectively. Thus the Treasury Board became the employer of the employees in these two agencies. The employees in fourteen bargaining units, seven for each of these agencies, were absorbed into the appropriate Treasury Board units.

2. Except where otherwise indicated, the bargaining units for employees of the Treasury Board coincide with the occupational groups defined and specified by the Public Service Commission under s. 26 of the PSSRA. See Chapter 3, p. 102 ff., above.
3. The Public Service Alliance, Canadian Union of Postal Workers, Letter Carriers Union of Canada, Canadian Merchant Service Guild, the employee organizations constituting the Canadian Graphic Arts Union, the Federal Government Dockyards Trades and Labour Councils, and the United Food and Commercial Workers Union are affiliated with the Canadian Labour Congress. The International Brotherhood of Electrical Workers is now affiliated with the Canadian Federation of Labour. The *Syndicat général du cinéma et de la télévision* is a Canadian-based union affiliated with the Quebec-based Confederation of National Trade Unions. The other bargaining agents are not affiliated with any central labour federation.
4. The figures in this column are as of 31 March 1981.
5. Professional Institute of the Public Service of Canada.
6. Public Service Alliance of Canada.
7. See note 1, above, regarding employees of the Defence Research Board.
8. In 1975 the Economists', Sociologists' and Statisticians' Association was certified as bargaining agent for this unit, displacing PIPS (certified in 1968).
9. The original specification of arbitration as the process for this unit was altered in 1971 to reference to a conciliation board, but again reverted to arbitration in 1979.
10. Initial specification: arbitration; altered: 1977; reverted: 1978.
11. PSAC was certified as bargaining agent for this unit in 1976, displacing PIPS (certified in 1967).
12. Initial specification: arbitration; altered: 1977.
13. Initial specification: arbitration; altered: 1975.
14. Initial specification: arbitration; altered: 1974.
15. Initial specification: arbitration; altered: 1975.
16. Initial specification: arbitration; altered: 1976.
17. Initial specification: arbitration; altered: 1976; reverted: 1977.
18. Initial specification: arbitration; altered: 1974; reverted: 1976.
19. Initial specification: arbitration; altered: 1976.
20. Initial specification: arbitration; altered: 1973.
21. Initial specification: arbitration; altered: 1980.
22. Professional Association of Foreign Service Officers.
23. Initial specification: arbitration; altered: 1975; reverted: 1979.
24. The Canadian Union of Professional and Technical Employees (CUPTE) was certified as bargaining agent for this unit in 1978, displacing PIPS (certified in 1968).
25. PIPS had initially specified arbitration then altered it in 1973. CUPTE, after its certification, specified reference to a conciliation board.
26. In 1978 CUPTE was certified for this unit, displacing PIPS (certified in 1968).
27. Initial specification: arbitration; altered: 1975; upon being certified in 1978, CUPTE specified reference to a conciliation board.
28. Canadian Air Traffic Control Association.
29. See, however, Chapter 10, p. 479, above.
30. For an account of the manner in which this bargaining unit came to be determined, see Chapter 3, p. 104, above.
31. International Brotherhood of Electrical Workers, Local 2228.
32. Initial specification: arbitration; altered: 1976.
33. Initial specification: arbitration; altered: 1975; reverted: 1978.
34. Initial specification: arbitration; altered: 1974.
35. In 1981 CUPTE was certified as bargaining agent for this unit, displacing PSAC (certified in 1967).
36. Initial specification: conciliation board; altered: 1973; reverted: 1975. Upon being certified as bargaining agent, CUPTE specified reference to a conciliation board.
37. Canadian Merchant Service Guild.
38. Initial specification: arbitration; altered: 1978.
39. See also note 63, below.

40. Initial specification: arbitration; altered: 1975.
41. Initial specification: arbitration; altered: 1970; reverted: 1972; altered again to reference to a conciliation board in 1974.
42. Initial specification: arbitration; altered: 1975.
43. The PSSRB divided the correctional occupational group into a supervisory unit and a non-supervisory unit.
44. Initial specification: arbitration; altered: 1976; reverted: 1979; altered again to reference to a conciliation board in 1981.
45. The PSSRB divided the firefighters occupational group into a supervisory unit and a non-supervisory unit.
46. Initial specification: arbitration; altered: 1971; reverted: 1974.
47. The PSSRB divided the general labour and trades occupational group into a supervisory unit and a non-supervisory unit.
48. Initial specification: arbitration; altered: 1971.
49. The PSSRB divided the general services occupational group into a supervisory unit and a non-supervisory unit.
50. Initial specification: arbitration; altered: 1980.
51. The PSSRB divided the heating, power and stationary plant occupational group into a supervisory and a non-supervisory unit.
52. Initial specification: arbitration; altered: 1971.
53. The PSSRB divided the hospital services occupational group into a supervisory unit and a non-supervisory unit.
54. Initial specification: arbitration; altered: 1980.
55. The PSSRB divided the lightkeepers occupational group into a supervisory and a non-supervisory unit.
56. Association of Postal Officials of Canada. The PSSRB divided the postal operations occupational group into four units: a supervisory unit, a railway mail-clerks unit, a full-time non-supervisory unit, and a part-time non-supervisory unit. The Letter Carriers Union of Canada and the Canadian Union of Postal Workers formed a Council of Postal Unions which was certified as bargaining agent for two units: the full-time non-supervisory unit and the part-time non-supervisory unit. In 1974 the Letter Carriers Union of Canada applied for revocation of the certification that had been issued to the Council of Postal Unions, and subsequently the Letter Carriers Union was certified as bargaining agent for the 'outside' postal workers (full-time and part-time), and the Canadian Union of Postal Workers was certified as bargaining agent for the 'inside' postal workers (full-time and part-time). See pp. 479–80.

    The Canada Post Corporation Act, S.C. 1981, c. 54, was proclaimed in force 16 October 1981, with the result that all employees in the Post Office now come under the jurisdiction of the Canada Labour Code administered by the Canada Labour Relations Board.
57. Council of Graphic Arts Unions.
58. Now under the Canada Labour Code.
59. Canadian Postmasters and Assistants Association.
60. Initial specification: arbitration; altered: 1972.
61. Initially the PSSRB had determined that one unit consisting of all the employees in the ship-repair occupational group on both the east and west coasts was appropriate. The Board certified the Federal Government Dockyards Trades and Labour Council as the bargaining agent. In 1976 the Council was split into two councils, one for each coast. These became the Federal Government Dockyards Trades and Labour Council East and the Federal Government Dockyards Trades and Labour Council (Esquimault, B.C.). Thereupon the ship-repair occupational group was divided by the PSSRB into two units, one for each coast.
62. The PSSRB divided the ships' crews occupational group into a supervisory unit and a non-supervisory unit.
63. The definition and specification of occupational groups by the Public Service Commission according to s. 26 of the PSSRA (see Chapter 3, above) included the following additional occupational groups: university teaching (scientific and professional category); administrative trainees (administrative and foreign service category); organization and methods (administrative and foreign service category); personnel administration (administrative and foreign service category); ships' pilots (technical category); and telephone operators (administrative support category). No application has been made for certification for the employees in the personnel administration occupational group. Applications for certification for employees in the university teaching, administrative trainees, and organization and methods groups were withdrawn.

The Canadian Merchant Service Guild was certified as bargaining agent for a unit of certain east coast pilots (see *Ships Pilots Case No. 1*, [1969] PSSR Reports K 423). The Pilotage Act, S.C. 1971–72, c. 52, established Pilotage Authorities throughout Canada; each was empowered to employ such officers and employees as it deemed necessary. The Act declared that a Pilotage Authority was not an agent of Her Majesty. Accordingly the pilots ceased to be employees in the Public Service and now come under the Canada Labour Code.

PSAC had been certified as bargaining agent for a unit consisting of the employees in the telephone occupational group (one of the occupational groups specified by the Commission). In due course, these employees were reclassified and absorbed into the clerical and regulatory occupational group; a unit comprising the employees in the latter group is also represented by PSAC.

64. The Office of the Auditor General of Canada, established by S.C. 1976–77, c. 34, s. 24, was transferred from Part I of Schedule I to Part II of that Schedule.
65. Initial specification: arbitration; altered: 1974.
66. The employees in a number of occupational groups who had initially been on the staff of the National Research Council, and for whom bargaining agents had been certified, were transferred in 1975 to the Communications Security Establishment of the Department of National Defence. See below, note 71.
67. Initial specification: arbitration; altered: 1980.
68. Initial specification: arbitration; altered: 1975; reverted: 1977; again altered to reference to a conciliation board in 1980.
69. Research Council Employees Association.
70. Initial specification: arbitration; altered: 1980.
71. The Communications Security Establishment of the Department of National Defence was declared to be a separate employer by SOR/75–103. See note 66, above.
72. Initial specification: conciliation board; altered: 1978.
73. Initial specification: arbitration; altered: 1980.
74. *Syndicat général du cinéma et de la télévision*. The SGCT was certified in 1977 as bargaining agent for this unit, displacing PSAC (certified in 1969).
75. The SGCT was certified in 1977 as bargaining agent for this unit, displacing PSAC (certified in 1968). PSAC had initially specified arbitration, but altered it to reference to a conciliation board in 1975. SGCT specified arbitration as the appropriate process.
76. The Staff of the Non-Public Funds, Canadian Forces, was declared to be a separate employer by SOR/78–627.
77. Initial specification: conciliation board; altered: 1981.
78. United Food and Commercial Workers Union, Local 1973. The name of the bargaining agent originally certified for this unit was 'Retail Clerks International Union, Local 1973'. The organization subsequently changed its name to 'United Food and Commercial Workers Union, Local 1973', and the PSSRB amended the certificate accordingly.
79. Manitoba Food and Commercial Workers Union, Local 832.
80. The Social Sciences and Humanities Research Council was established by Part I of the Government Organization (Scientific Activities) Act, S.C. 1976–77, c. 24. It was declared to be a separate employer by SOR/78–283.

Table 9: *Selected Provisions in Collective Agreements: Inter-Sectoral Comparisons, July 1981*[1]

	Percentage of Bargaining-Unit Employees Covered		
Provision Analysed	*Private Sector*[2]	*Federal (PSSRA)*[3]	*Provincial Public Services*[4]
Management Rights			
Some provision	74.3	99.4	65.8
No provision	25.7	0.6	34.2
Union Security (membership)			
Closed shop	7.0		
Union shop	30.7		10.7
Modified union shop	16.2		17.2

Maintenance of membership	4.6		6.4
No provision	41.1	100.0	65.4
Union Security (check-off)			
Voluntary	10.9		6.3
Rand Formula[5]	55.4	99.9	80.1
Compulsory for union members only	29.9		10.6
No provision	2.3		2.8
Leave of Absence for Union Business			
Some provision	77.1	96.5	97.2
No provision	22.9	3.5	2.8
Compensation for Grievance Work			
Some provision	58.7	98.3	93.4
No provision	41.3	1.7	6.6
Compensation for Union Officials Negotiating Collective Agreement			
Some provision	26.4	87.1	63.3
No provision	73.6	12.9	36.7
Picket Lines and Hot Cargo			
Some provision	15.9		12.9
No provision	84.1	100.0	87.1
Labour/Management Consultation (industrial relations issues)			
Some provision	68.2	98.9	5.8
No provision	31.8	1.1	94.2
Special Grievance Procedure (discipline or dismissal)			
Reduced number of steps	41.5	96.5	85.7
Time delays reduced	12.8		
Both reduced	7.6	2.5	
No provision	37.0	0.3	14.2
Training or Re-Training (not related to technological change)			
Some provision	72.8	25.2	61.9
No provision	27.2	74.8	38.1
Period of Probation after Hiring			
Some provision	86.2		86.5
No provision	13.8	100.0	13.5
Seniority on Promotion			
Some provision	78.5	7.8[6]	87.2
No provision	21.5	92.2	12.8
Seniority on Lay-off			
Some provision	92.9	0.3	37.1
No provision	7.1	99.7	62.9

Recall from Lay-off			
Some provision for seniority	83.5	0.3	35.8
No provision	16.5	99.7	64.2
Retention of Seniority on Lay-off			
Some provision	74.2	12.3	60.7
No provision	25.8	87.7	39.3
Retention of Seniority (illness)			
Some provision	71.7	8.9	49.1
No provision	28.3	91.1	50.9
Technological Change (notice and/or consultation prior to introduction)			
Less than 3 months	7.9	34.9	1.8
3–6 months	23.6	39.8	1.5
6–12 months	4.8		3.6
Other	17.4	1.8	13.8
No provision	46.1	23.3	79.0
Training or Re-Training (technological change)			
Some provision	45.5	19.5[7]	28.8
No provision	54.5	80.5	71.2
Labour/Management Committee (study problems related to technological change)			
Some provision	19.3	81.9	41.4
No provision	80.3	18.1	58.6
Employment Security (technological change)			
Some provision	34.8	16.7[8]	25.4
No provision	64.9	83.2	74.5
Daily Hours of Work			
Less than 7.5	6.1	1.2	72.4
7.5	4.5	67.4	2.9
8	72.2	30.1	21.8
Other	12.4		1.9
No provision	4.8	1.1	0.5
Weekly Hours			
Less than 37.5	9.3	1.2	70.8
37.5	3.6	67.4	2.5
38–40	8.6		0.4
40	72.0	30.3	25.9
Other	2.8		
No provision	3.7	0.4	
Flexible Working Hours			
5-day variable starting and quitting	2.2	12.1[9]	21.7
Other	2.1	1.8	5.7
No provision	95.7	86.1	72.4
Time Off in Lieu of Overtime			
Time off in lieu of overtime pay	2.4	54.3	58.9

Banking of overtime credits for cumulative time off	6.4	13.9	10.9
No provision	90.9	31.7	30.0
Right to Refuse Overtime			
Some provision	48.4	19.9	17.0
No provision	51.6	80.1	83.0
Equal Distribution of Overtime			
Some provision	51.9	91.2	42.3
No provision	48.1	8.8	57.7
Overtime Compensation after Daily Hours			
Some provision	96.5	96.9	96.7
No provision	3.5	3.1	3.3
Overtime Compensation after Weekly Hours			
Some provision	65.7	57.1	54.3
No provision	34.3	42.9	45.7
Overtime Compensation on Saturday or 6th Day			
Some provision	75.5	98.9	86.6
No provision	24.5	1.1	13.4
Overtime Compensation on Sunday or 7th Day			
Some provision	80.5	99.5	89.8
No provision	19.5	0.5	10.2
Premium Pay (regularly scheduled Saturday)			
Some provision	14.7	81.3	19.5
No provision	85.3	18.7	80.5
Premium Pay (regularly scheduled Sunday)			
Some provision	29.6	77.7	19.5
No provision	70.4	22.3	80.5
Premium Pay for Work on Paid Holidays			
Some provision	93.2	98.7	97.0
No provision	6.8	1.3	3.0
Premium Pay for Dangerous and/or Dirty Work			
Some provision	17.7	63.3	37.1
No provision	82.3	36.7	62.9
COLA			
Provision exists	58.8	16.2[10]	29.2
No provision	41.2	83.8	70.8
Severance Pay and SUB[11]			
Severance pay (no SUB)	32.5	99.8	61.4
SUB (with severance)	18.9		
SUB (no severance)	5.9		
No provision	39.4	0.1	38.5
Severance Pay on Lay-off			
Provision exists	34.3	99.9	39.1
No provision	65.7	0.1	60.9

Severance Pay on Resignation			
Provision exists	3.6	99.2	25.4
No provision	96.4	0.1	74.6
Severance Pay on Retirement			
Provision exists	4.9	99.7	47.4
No provision	95.1	0.3	52.6
Number of Paid Holidays			
Less than eleven	28.2		3.7
Eleven	32.4	99.4	44.3
More than eleven	37.6		48.7
No provision	1.8	0.2	2.8
3 Weeks' Paid Vacation			
After one year's service or less	9.2	84.4[12]	92.4[13]
After 2 years' service		14.8	
After 5 years' service	45.7		
4 Weeks' Paid Vacation			
After one year's service			22.8
After 7 years' service			11.8
After 8 years' service			10.6
After 9 years' service	12.4		7.6
After 10 years' service	19.7	90.9	13.5
After 11 years' service	10.6		24.5
After more than 11 years	13.0	7.8	7.0
5 Weeks' Paid Vacation			
After 11 years' service	25.6		11.3
After 18 years' service			10.9
After 19 years' service			7.0
After 20 years' service			32.0
After 21 years' service	11.8		
After 22 years' service		41.3	
After 25 years' service		49.4	28.4
6 Weeks' Paid Vacation			
After 19 years' service			11.3
After 30 years' service	24.9	10.3	5.5
More Than 6 Weeks' Paid Vacation			
Some provision	5.4	8.7	0.5
No provision	94.5	91.3	99.5
Paid Bereavement Leave			
Some provision	34.3	99.0	88.8
No provision	65.7	1.0	11.2
Paid Leave: Marriage			
Some provision	7.8	98.9	37.3
No provision	92.2	1.1	62.7
Paid Paternity Leave			
Some provision	8.2	99.1	56.0
No provision	91.8	0.9	44.0
Paid Adoption Leave			
Some provision	6.6	99.1	49.3
No provision	93.4	0.9	50.7

Education Leave (paid and/or unpaid)			
Some provision	22.9	78.2	81.1
No provision	77.1	21.8	18.9
(Women) Maternity and Adoption-Leave Pay[14]			
With pay	1.6		1.8
With and without pay	0.9	18.6	22.3
Use of sick leave	0.1		6.1
No provision for pay	97.4	81.2	69.5
(Women) Maternity and Adoption Leave (time limitation before and after)[15]			
Up to 3 months	1.9	0.1	12.2
3–4 months	2.2		
4–5 months	10.5	7.4	23.1
5–6 months	4.8		29.3
6 months or more	14.9	81.0	20.9
Other	9.2		9.8
No provision	56.5	11.2	4.7
Industrial Safety			
Safety program and/or safety committee	73	99.8	90.4
No provision	27	0.2	9.6
Environmental Protection			
Specific reference	3.1	8.7[16]	
No provision	96.9	91.3	100.0

Notes:

1. Unpublished Labour Canada Statistics.

   Provisions analysed in this table are presented in the order in which they have been discussed in Chapter 7, above. In some cases, the numbers given do not add up to 100%, but the discrepancies are so small as to be insignificant.
2. Collective agreements covering 500 or more employees.
3. All collective agreements negotiated under PSSRA.
4. Collective agreements covering 200 or more employees.
5. See above, Chapter 7, p. 310 and note 8 in that chapter.
6. Separate employers, not subject to terms of Public Service Employment Act. See Chapter 7, pp. 321–22, above.
7. Note that this includes the postal agreements that no longer come under the jurisdiction of the PSSRA.
8. CUPW, LCUC and Canadian Postmasters and Assistants Association.
9. These figures underestimate the practice in the federal public service. See Chapter 7, p. 331, above.
10. With the transfer of the postal unions to the jurisdiction of the Canada Labour Code, there are no longer any COLA provisions in agreements negotiated under the PSSRA.
11. Supplementary Unemployment Benefit.
12. This is as stated in the Labour Canada data. The collective agreements actually provide for three weeks' paid vacation "in the first year of service".
13. 72.9 per cent "after one year's service". 19.5 per cent "after less than one year's service".
14. The figures on maternity leave in this table do not take account of the benefits negotiated by CUPW in the summer of 1981 and extended since then to other groups. Discussed above in Chapter 7, pp. 349–50 and Chapter 8, p. 380.
15. See provisions for unpaid paternity leave and adoption leave for men, discussed above in Chapter 7, p. 351.
16. This figure represents the members of CUPW, who no longer form part of the public service.

Table 10: *Average Annual Percentage Increase in Base Rates for New Settlements, Compound Rate of Increase Over the Term of Agreement, 1967 –1975*[1]

	1967	*1968*	*1969*	*1970*	*1971*	*1972*	*1973*	*1974*	*1975*
Total	8.8	7.8	7.6	8.5	7.8	8.0	10.3	14.3	16.9
Private:[2]	7.7	7.8	8.2	8.5	7.9	9.1	10.5	14.3	14.7
Manufacturing	7.7	7.9	8.4	8.3	7.6	9.0	9.4	13.1	13.9
Public:	11.1	7.9	7.2	8.3	7.7	7.1	10.0	14.2	19.1
Federal	—	6.2	6.2	5.7	6.6	8.8	9.0	11.3	13.6
Provincial	8.5	8.2	8.5	7.1	7.9	8.0	10.0	14.6	19.3
Quasi-public	9.1	10.4	8.3	9.2	8.5	7.8	10.5	19.0	20.8
Municipal	12.4	6.9	11.3	9.9	9.3	7.5	9.9	12.5	17.6

Notes:

1. J.M. Cousineau and R. Lacroix, *Wage Determination in Major Collective Agreements in the Private and Public Sectors* (Ottawa: Economic Council of Canada, 1977).
   Averages are weighted by the number of employees covered.
2. Figures are taken from collective agreements covering 500 or more employees.

Table 11:[1] *Annual Percentage Base Wage Increases,*[2] *Private and Public Sectors, Canada 1967 –1979*

			Components within the Public Sector				
Year	*Private*	*Public*	*Federal*[3]	*Provincial*	*Local*	*HEW*[4]	*Utilities*[5]
1967	7.8	9.6	n.a.	8.5	12.5	9.4	9.7
1968	8.1	7.6	7.0	8.3	7.0	10.0	6.5
1969	8.6	7.2	6.3	8.5	11.4	6.9	7.2
1970	8.6	8.4	8.4	7.2	9.9	8.9	7.7
1971	8.0	7.6	6.6	7.9	9.4	8.4	6.7
1972	9.2	7.2	8.9	8.0	7.6	6.5	7.9
1973	10.1	10.6	12.3	10.1	9.9	10.2	10.4
1974	14.4	14.8	11.3	15.1	12.6	17.8	18.0
1975	14.4	18.6	14.3	20.0	17.8	21.3	17.2
1976	9.3	10.7	11.5	11.1	10.6	10.2	11.7
1977	7.3	7.9	9.6	7.8	7.8	6.7	8.3
1978	6.9	6.9	6.8	7.0	6.7	6.4	8.4
1979[6]	8.9	7.7	7.5	7.9	8.0	7.8	7.9
Average[7]	9.3	9.6	9.2	9.8	10.1	10.0	9.7

Notes:

1. Morley Gunderson, "Public Sector Compensation in Canada and the U.S.", 19 *Industrial Relations: A Journal of Economy and Society* (1980), p. 266.
2. From collective agreements covering 500 or more employees, excluding construction.
3. Settlements covered by the Public Service Staff Relations Act, excluding employees in the education, health and welfare group.
4. Health, education and welfare.
5. Telephone, electrical and water utilities.
6. Figures for 1979 are for the first half of the year only, and they are based on a slightly revised format whereby, for example, Federal includes health, education, and welfare personnel covered under the Public Service Staff Relations Act.
7. Simple unweighted average over the 1967–1970 period. The average annual compound rate over the period was almost identical.

Table 12:[1] *Average Annual Percentage Change in Base Wage Rate:*[2] *Public and Private Sector New Contracts, 1967 – 1975*

	(Weighted by number of employees in each contract)								
Group	*1968*	*1969*	*1970*	*1971*	*1972*	*1973*	*1974*	*1975*	*Average*
Private Sector	7.8	8.5	8.4	8.3	9.4	11.3	16.8	18.4	11.1
Public Sector	7.9	6.5	7.3	6.9	8.4	9.8	14.6	17.1	9.8
Components of the Public Sector:									
Federal Government	7.9	5.6	5.8	6.6	8.9	9.2	11.2	14.9	8.8
Provincial & Local Government	6.9	10.8	8.5	8.5	7.7	10.1	13.6	22.1	11.0
Education	7.6	6.4	8.4	6.9	8.3	9.4	14.8	20.6	10.3
Health	10.5	7.2	9.8	9.4	8.0	12.0	28.6	26.6	14.0

Notes:

1. Auld *et al.*, *The Determinants of Negotiated Wage Settlements in Canada* (Ottawa: Anti-Inflation Board, 1979).
2. Figures are taken from collective agreements covering 200 or more employees, excluding construction workers.

Table 13: *Percentage Increase in Base Rates 1968 – 1976*[1]

All sectors	122.5
Private sector	120.2
Public sector	124.3
• municipal public services	132.4
• provincial public services	129.2
• federal public service	112.9
All sectors less the federal public service	125.3

Note:

1. Government of Canada, *Agenda for Cooperation* (Ottawa, 1977).

Table 14: *Ratio of Public to Private Sector Hourly Rates of Pay for Selected Positions, 1978 (exclusive of Federal Government)*[1]

Occupation and Level		*Mean Hourly Rate of Pay in the Private Sector*	*Federal Government Enterprises*	*Provincial Government Enterprises*	*Provincial & Territorial Governments*	*Municipal Governments*
Professional Group						
Engineer	1	8.34	.94	1.09	1.06	1.30
	2	9.95	.99	1.15	1.09	1.27
	3	11.74	1.00	1.17	1.10	1.17
	4	14.08	1.00	1.16	1.13	1.15
	5	16.52	.97	1.17	.98	1.05
	6	19.32	1.00	1.14	.94	1.03
Financial Administrator	2	9.49	1.08	1.28	.99	1.20
	3	11.29	.92	1.18	1.14	1.15
	4	13.41	.99	1.16	1.25	1.08
	5	16.19	1.03	1.15	.91	1.08
	6–7	19.30	.97	1.02	.86	1.03
Computer Systems Administrator	1	8.50	1.04	1.09	1.03	1.02
	2	10.94	1.03	1.15	1.20	1.08
	3	13.30	1.00	1.15	1.32	1.01
	4	15.70	1.04	1.18	—[2]	1.07
	5	19.91	.97	1.00	—	—
Technical Group						
Draftsman	1	5.91	1.02	1.16	.94	1.06
	2	6.73	1.03	1.10	.93	1.13
	3	8.20	.98	1.14	.88	1.09
	4	9.48	.97	1.10	.90	.96
	5	10.37	1.05	1.28	.92	1.02
	6	11.53	—	1.19	—	.99
	7	12.52	—	—	—	1.05

Data Processor (Conversion)	1	4.88	—	.95	1.12	1.21
	2	5.67	1.07	1.12	1.01	1.10
	3	6.54	.88	1.14	.93	1.03
	5	7.90	—	1.23	.88	—
Data Processor (Production)	2	5.83	1.18	1.21	1.00	—
	3	6.66	1.04	1.15	.95	1.23
	4	8.00	1.01	1.13	.96	1.26
	5	9.91	1.05	1.12	.93	1.05
	7	13.78	—	1.01	—	—
Administrative Support Group						
Clerk	1	4.44	1.00	1.11	1.17	1.06
	2	5.22	1.03	1.10	1.05	1.05
	3	5.59	1.09	1.25	1.08	1.19
	4	6.12	1.23	1.36	1.11	1.23
	5	7.64	1.07	1.28	1.05	1.13
Typist	1	4.51	1.07	1.19	1.15	1.18
	2	5.11	1.08	1.17	1.09	1.11
Stenographer	1	5.28	1.04	1.06	.98	1.04
	2	5.52	1.10	1.23	1.03	1.10
Secretary	2	6.29	1.03	1.15	.99	1.14
	3	7.15	.99	1.20	.97	1.10

Notes:

1. Mark J. Daniel and William A. Robinson, *Compensation in Canada: A Study of the Private and Public Sectors* (Ottawa: The Conference Board in Canada, 1980). This information is based on Pay Research Bureau data.
2. Symbol (—) indicates that sample was not large enough to report data.

Table 15: *Ratio of Federal Government Maximums to Private Sector Mean Hourly Rates of Pay for Selected Positions, 1978*[1]

Occupation and Level		*Mean Hourly Rate of Pay in the Private Sector*	*Federal Government Maximum as a Percentage of Private Sector Mean*
Professional Group			
Engineer	1	$ 8.34	1.04
	2	9.95	1.03
	3	11.74	1.05
	4	14.08	1.02
	5	16.52	1.00
	6	19.32	.96
Financial Administrator	2	$ 9.49	1.07
	3	11.29	.99
	4	13.41	.98
	5	16.19	.95
Computer Systems Administrator	1	$ 8.50	1.16
	2	10.94	1.06
	3	13.30	1.05
	4	15.70	1.01
	5	19.91	.98
Economist*	1	$10.65	1.14
	2	13.96	1.24
	3	17.58	1.09
	4	21.52	.97
Technical Group			
Draftsman	1	$ 5.91	1.04
	2	6.73	1.14
	3	8.20	1.03
	4	9.48	.98
	5	10.37	.99
	6	11.53	.96
	7	12.52	.96
Data Processor (Conversion)	1	$ 4.88	1.06
	2	5.67	1.00
	3	6.54	.95
	4	7.90	.95
Data Processor (Production)	2	$ 5.83	1.09
	3	6.66	1.07
	4	8.00	.99
	5	9.91	.89
	7	13.78	.80
Administrative Support Group			
Clerk	1	$ 4.44	1.03
	2	5.22	.99
	3	5.59	1.11
	4	6.12	1.12
	5	7.64	1.02

Typist	1	$ 4.51	.97
	2	5.11	.92
Stenographer	1	$ 5.28	.99
	2	5.52	1.01
Secretary	2	$ 6.27	1.04
	3	7.15	1.04

* There was a special problem in comparing economists in the federal government and private sector in that the federal government economists were reclassified from a five- to eight-level classification in 1976, while the Pay Research Bureau continued to survey private sector firms using the old five-level system. In 1976, however, those government economists at the old level 1 were transferred to the new level 3, those at the old level 2 to the new level 5, old level 3 to the new level 6, old level 4 to the new level 7, *etc.* Given this information, a transformation of the new levels 3, 5, 6, and 7 to the old levels 1, 2, 3, and 4 was made for the federal government economists in this table to ensure comparability with the private sector.

Note:

1. Mark J. Daniel and William A. Robinson, *Compensation in Canada: A Study of the Private and Public Sectors* (Ottawa: Conference Board in Canada, 1980).

This material is based on figures provided by the Pay Research Bureau, Public Service Staff Relations Board, and Federal Treasury Board.

Table 16: *Distribution of Employment in the Federal Government and the Private Sector, 1978*[1]

Occupation and Level		*Federal Government*	*Private Sector*
Professional Group			
Engineer	1	1.7	11.5
	2	5.2	17.0
	3	25.5	23.8
	4	32.9	25.7
	5	25.3	14.5
	6	9.4	7.4
Economist	1	17.9	27.6
	2	43.4	33.0
	3	25.0	26.9
	4	13.7	12.5
Financial Administrator	2	24.9	29.4
	3	25.0	30.5
	4	20.2	21.6
	5	16.1	12.3
	6−7	13.2	6.1
Computer System Administrator	1	18.8	42.0
	2	42.7	29.1
	3	27.7	20.1
	4	8.1	7.3
	5	2.7	1.5

Technical Support			
Draftsman	1	0.9	5.3
	2	10.9	15.4
	3	13.3	30.5
	4	51.2	32.4
	5	17.6	12.8
	6	4.3	3.6
	7	1.9	1.0
Data Processor (Conversion)	1	14.3	14.9
	2	62.9	63.5
	3	14.4	17.0
	4	3.1	—
	5	5.3	4.7
Data Processor (Production)	2	30.1	27.1
	3	28.6	25.3
	4	24.1	31.6
	5	13.1	13.3
	7	4.1	2.5
Administrative Support			
Clerk	1	1.3	10.7
	2	19.7	15.6
	3	34.0	39.2
	4	32.7	30.8
	5	12.3	3.7
Typist	1	11.5	48.4
	2	83.5	51.6
Stenographer	1	42.9	25.8
	2	57.1	74.2
Secretary	2	66.5	65.4
	3	33.5	34.6

Note:

1. Mark J. Daniel and William A. Robinson, *Compensation in Canada: A Study of the Private and Public Sectors* (Ottawa: The Conference Board in Canada, 1980).

This information is based on data provided by the Pay Research Bureau, Public Service Staff Relations Board, and the Treasury Board.

The percentages may not add up to 100 because of 'rounding'.

Table 17: *A Comparison of Wage Outcomes and Impasse Procedures for the 1974–1975 Period*[1]

Occupational Category	*Weighted average annual percentage wage increases* *Strike*	 *Arbitration*	*Degrees of Freedom*	*T-Ratio*
Scientific and Professional	27.59	10.11	23	11.5[2]
Administrative and Foreign Service	12.14	10.10	8	1.67
Technical	10.85	12.45	9	0.61
Administrative Support	14.79	7.50	4	20.82[2]
Operational	28.87	10.89	20	7.34[2]

Notes:

1. A.V. Subbarao, "Impasse Choice and Wages in the Canadian Federal Service", 18 *Industrial Relations: A Journal of Economy and Society* (1979), p. 235. Data were collected from "Bargaining Calendar" maintained by the Treasury Board.
2. Significant at .001.

Table 18: *Weighted Average Percentage Increases by Employee Category and Dispute-Resolution Method, August 1974–December 1975*[1]

	1974 (Aug-Dec)		*1975 (Jan-Dec)*	
Category	*Conciliation board/ right to strike*	*Arbitration*	*Conciliation board/ right to strike*	*Arbitration*
Scientific and professional	11.31 (3)	9.60 (9)	13.60 (6)	8.49 (22)
Administrative and foreign service	7.80 (1)	8.77 (8)	10.35 (2)	11.25 (8)
Technical	7.75 (1)	10.71(2)	10.56 (5)	15.85 (8)
Administrative support	15.00 (1)	7.50 (5)	12.05 (2)	11.75 (1)
Operational	12.63 (2)	12.12 (7)	19.50 (7)	10.95 (7)

Note:

1. Felix Quinet, "Impasse Choice and Wages in the Canadian Federal Service", 19 *Industrial Relations: A Journal of Economy and Society* (1980), p. 361.

The numbers in brackets indicate the number of bargaining units.

Lump-sum payments, including those of $500 granted to most groups in April 1974, are not shown because they were not converted to percentages.

Where two or more increases were given in a year, the percentages were added.

Some of the increases were granted at the beginning and the end of a calendar year, but were included according to the effective date of the increase. The values were not annualized.

Table 19: *Wage and Salary Increases, Federal Public Service, by Method of Settlement and Year, 1966–78*[1]

	Arbitration Route				*Conciliation/Strike Route*		*All Settlements*	
	Negotiated		*Arbitral Award*					
Year	*Number of Contracts*	*Average Percentage Increase*[2]	*Number of Contracts*	*Average Percentage Increase*[2]	*Number of Contracts*	*Average Percentage Increase*[2]	*Number of Contracts*	*Average Percentage Increase*[2]
1966	10	5.8	—	—	1	6.9	11	5.9
1967	78	6.6	1	7.0	7	6.6	86	6.7
1968	6	6.6	4	6.7	1	8.4	11	6.6
1969	57	5.6	5	5.7	8	5.9	70	5.6
1970	54	5.9	12	6.0	2	6.1	68	6.0
1971	11	6.6	7	5.6	6	7.3	24	6.5
1972	27	6.3	8	5.8	3	10.3	38	6.5
1973	34	8.2	11	8.6	6	9.1	51	8.4
1974	27	10.3	8	13.2	7	13.9	42	11.5
1975	24	13.2	9	11.5	15	15.2	48	13.5
1976	34	9.5	15	7.6	19	9.6	68	9.1
1977	32	6.3	21	7.1	23	6.5	76	6.6
1978	11	6.6	5	6.2	12	6.7	28	6.6
1966–78	405	7.3	106	7.7	110	9.0	621	7.8

Notes:

1. Computed from Pay Research Bureau tabulations. This table appears in George Saunders, *Interest Arbitration and Wage Inflation in the Federal Public Service* (Ottawa: Economic Council of Canada, 1980). Since several agreements provided for increases retroactive to 1966, that year was taken by Saunders as the starting point of the statistical analysis.
2. Increases are percentage changes in wage and salary rates over the life of the contract, expressed at an annual (compound) rate. The annual increase for each contract is shown against the year in which the first increase became effective.

Table 20: *Wage and Salary Increases, Federal Public Service, by Method of Settlement and Sub-Period, 1966–78*[1]

	Arbitration Route				*Conciliation/Strike Route*		*All Settlements*	
	Negotiated		*Arbitral Award*					
Sub-Period	*Number of Contracts*	*Average Percentage Increase*	*Number of Contracts*	*Average Percentage Increase*	*Number of Contracts*	*Average Percentage Increase*	*Number of Contracts*	*Average Percentage Increase*
1966–70	205	6.1	22	6.1	19	6.4	246	6.1
1971–75	123	9.1[2]	43	9.1	37	12.3[3]	203	9.7
1976–78	77	7.7	41	7.2	54	7.7	172	7.6
1966–78	405	7.3[2]	106	7.7	110	9.0[3]	621	7.7

Notes:

1. Computed from Pay Research Bureau tabulations. This table appears in George Saunders, *Interest Arbitration and Wage Inflation in the Federal Public Service* (Ottawa: Economic Council of Canada, 1980). Since several agreements provided for increases retroactive to 1966, that year was taken by Saunders as the starting point of the statistical analysis.
2. Difference between conciliation/strike-route increase and directly negotiated increase in the arbitration route is significant at the 5% level of significance.
3. Difference between conciliation/strike-route increase and arbitral award is significant at the 5% level of significance.

All other differences in wage and salary increases among the three methods of settlement are not significant at this level of significance.

Table 21:[1] *Collective Agreements*[2] *in the Federal Public Service Under the PSSRA, 1967 to 1981 (Sept. 1) by Calendar Year*

						Calendar Year										
Category	*1967*	*1968*	*1969*	*1970*	*1971*	*1972*	*1973*	*1974*	*1975*	*1976*	*1977*	*1978*	*1979*	*1980*	*1981*	*Total*
Scientific and Professional	0	3	35	4	27	19	15	18	8	13	28	31	22	20	16	259
Administrative and Foreign Service	0	0	37	0	14	4	8	10	5	8	14	12	23	15	15	165
Technical	0	2	24	3	13	6	8	7	13	6	11	16	11	6	8	132
Administrative Support	0	0	22	2	12	1	5	7	5	7	8	12	11	5	9	106
Operational	0	22	11	18	15	10	17	2	20	13	13	26	19	13	10	209
Total	0	27	129	27	81	40	53	44	51	47	74	97	86	59	58	871

Notes:

1. This table is based on data supplied by the Pay Research Bureau.
2. Includes instances in which arbitral awards were issued.

Table 22: *Elapsed Time in Abitration Proceedings 1968 – 1981 (1 September 1981)*[1]

Calendar Year[2]	*Average Time from Request to Award*	*Range in Days*	*Number of Awards*	*Average Time from Award to Agreement*	*Range in Days*	*Number of Agreements*
1969	97.5	67–113	4	55	27–122	4
1970	131.46	27–211	13	123.38	31–373	13
1971	119.28	62–286	7	130.85	27–492	7
1972	222.88	84–504	9	122.57	0–484	7[3]
1973	145.14	76–226	7	99.14	8–304	7
1974	134.94	28–435	17	56.76	9–176	17
1975	70.16	46–120	6	19	10–28	4[3]
1976	137.66	92–217	15	100.41	27–301	12[3]
1977	111.18	36–162	22	78.5	14–398	22
1978	90.42	57–135	19	70	14–442	18[3]
1979	70.47	47–109	19	35.21	15–163	19
1980	86.94	49–152	18	28.83	8–77	18
1981	69	42–80	8	55.62	23–164	8

Notes:

1. This table is based on information supplied by the Pay Research Bureau and Treasury Board. It is confined to proceedings in which the Treasury Board was the 'employer'.
2. According to the calendar year in which the request for abritration was submitted. There were no references to arbitration prior to February 1969.
3. Awards were not followed by the signing of an agreement in a number of instances.

Table 23: *Average Periods Required to Negotiate Collective Agreements in the Public Service of Canada, 1968 – 1981*[1]

	No. of Agreements[2]		*Average Elapsed Time (Days)*	
Round	*Arbitration*	*Conciliation/ Strike*	*Arbitration*	*Conciliation/ Strike*
1	101	15	213	269
2	106	18	442	394
3	97[3]	25	292	344
4	82[3]	26	304	294
5	67[3]	33	231	309
6	58[3]	30	262	219
7	59[3]	25	237	244
8	54	16	205	218
9	34[3]	9	228	200
10	14	4	246	232
11	1	—	360	—

Notes:

1. This table is based on data obtained from the Pay Research Bureau.
   Duration is the date notice to bargain is given to the date the new agreement is signed.
2. The figures in this table represent agreements under the two dispute-resolution processes irrespective of whether a dispute in the negotiations actually led to a reference to arbitration or to reference to a conciliation board.
3. In these rounds of bargaining, at least one instance arose in which the parties never signed a new agreement following an arbitral award. The elapsed time for these cases has been calculated from the day notice to bargain was given until the day when the arbitral award was issued.

Table 24: *Elapsed Time in Conciliation Board Proceedings 1968 – 1981 (September 1981)*[1]

Calendar Year[2]	*Average Time from Request to Report of Board*	*Range in Days*	*Number of Boards*	*Average Time from Report to Agreement*	*Range in Days*	*Number of Agreements*
1968	68	60–76	2	16.5	3–30	2
1969	58	54–64	3	27	11–39	3
1970	80.5	62–99	2	110	55–165	2
1971	78	75–82	3	68	52–84	3
1972	102	91–113	4	63.5	49–78	4
1973	88.33	57–124	3	53.33	26–68	3
1974	90.33	44–160	6	55.66	25–142	6
1975	69.85	51–304	7	69.85	34–125	7
1976	138	83–259	6	51.83[3]	18–93	6
1977	121.7	39–309	10	103.7[3]	22–179	10
1978	82.8	57–127	5	52.4	35–70	5
1979[4]	186.75	91–275	4	59.75	1–113	4
1980	116.4	58–141	5	28.8	14–49	5
1981	143.75	126–168	4	50.5	38–64	4

Notes:

1. This table is based on data supplied by the Pay Research Bureau and Treasury Board. It is confined to proceedings in which the Treasury Board was the 'employer'.
2. According to the calendar year in which the request for the establishment of a conciliation board was made.
3. In this year, 'return-to-work' legislation was enacted after a conciliation board reported. The elapsed time has been calculated as of the date when the legislation came into force.
4. A conciliation board appointed on an application involving the aircraft-operations unit in this calendar year is not included in this table. During the proceedings before the conciliation board, the parties agreed to refer certain matters in dispute to binding arbitration, with the board remaining seized of remaining issues. After the arbitration award was issued, the conciliation board reported that all outstanding issues had been resolved. An agreement was signed before the board made its report.

Table 25: *Lawful Strikes in the Federal Public Service*[1]

	1967 to 3 March 1982				
Bargaining Unit	*Date and Duration of Strike*	*Time Lapse between Conciliation Board Report and Commencement of Strike*	*Person-Days Lost*	*Date Settlement Achieved*	*Date Agreement Signed*
Postal Operations (NS) (CPU)	1968: 18 July to 8 Aug. (21 days)	7 days	360 000	9 Aug. '68	9 Aug. '68
Postal Operations (NS) (CPU)	1970: 26 May to 3 Sept. (101 days)	21 days	215 510	10 Sept. '70	16 Oct. '70
Ship Repair	1971: 8 Mar. to 14 Mar. (7 days)	24 days	8 000	12 Mar. '71	7 Apr. '71
Air Traffic Control	1972: 17 Jan. to 27 Jan. (10 days)	8 days	14 400	7 Mar. '72 (Binding Award)	29 Mar. '72
Electronics	1972: 6 Feb. to 28 Feb. (22 days)	26 days	30 930	26 Feb. '72	17 Mar. '72
Primary Products Inspection	1974: 23 Nov. to 4 Dec. (12 days)	13 days	2 450	4 Dec. '74	13 Dec. '74
General Labour & Trades (S & NS)	1975: 17 Feb. to 23 Mar. (31 days)	10 days	81 360	19 Mar. '75	28 Mar. '75
Postal Operations (NS) (LCUC)	1975: 21 Apr. to 24 Apr. (3 days)	13 days	20 000	24 Apr. '75	27 May '75
Nursing	1975: 3 May to 23 May (20 days)	9 days	1 500	15 July '75	15 July '75
Ship Repair	1975: 5 June to 1 Aug. (57 days)	21 days	10 600	28 July '75	13 Aug. '75
Postal Operations (NS) (CVPW)	1975: 21 Oct. to 2 Dec. (43 days)	13 days	690 170	30 Nov. '75	12 Dec. '75
Aircraft Operations	1976: 18 Mar. to 29 Apr. (43 days)	60 days	1 830	20 May '76 (Binding Award)	
Meteorology	1976: 15 Oct. (1 day)	9 days	30	29 Oct. '76	3 Nov. '76
Translation	1977: 11 May (1 day)	40 days	—[2]	13 May '77	10 June '77
Air Traffic Control	1977: 7 Aug. to 10 Aug. (3 days)	12 days	6 600	10 Aug. '77 (Legislated Settlement)	*[3]

1967 to 3 March 1982

Bargaining Unit	*Date and Duration of Strike*	*Time Lapse between Conciliation Board Report and Commencement of Strike*	*Person-Days Lost*	*Date Settlement Achieved*	*Date Agreement Signed*
Meteorology	1977: 9 Dec. (1 day)	14 days	70	19 Jan. '78	3 Feb. '78
General Labour & Trades (S&NS)	1977/78: 16 Dec. 77 to 13 Feb. 78 (59 days)	56 days	150	15 Feb. '78	14 Apr. '78
Radio Operations	1978: 30 Jan. to 9 Feb. (10 days)	14 days	40	20 Feb. '78	30 Mar. '78
Nursing	1978: 11 July to 1 Aug. (21 days)	32 days	440	2 Aug. '78	29 Sept. '78
Postal Operations (LCUC)	1978: 22 Sept. to 25 Sept. (4 days)	23 days	11 310	26 Sept. '78 (Mediation Panel)	10 Oct. '78
Postal Operations (CUPW)	1978: 12 Oct. to 18 Oct. (7 days)	8 days	144 580	17 Jan. '79 (Legislated Settlement)	*
Translation	1979: 8 Jan. to 16 Jan. (8 days)	21 days	—[2]	16 Jan. '79	16 Feb. '79
Radio Operations	1979: 28 Aug. to 31 Oct. (64 days)	8 days	22 850	15 Nov. '79	30 Nov. '79
Translation	1980: 26 Aug. to 10 Nov. 80 (77 days)	42 days	19 630	8 Nov. '80	5 Dec. '80
Data Processing	1980: 27 Aug. to 26 Sept. (30 days)	9 days	230	26 Sept. '80	26 Sept. '80
Clerical and Regulatory[4]	1980: 6 Sept. to 7 Oct. (30 days)	11 days	298 020	7 Oct. '80	17 Oct. '80
Postal Operations (CUPW)	1981: 29 June to 10 Aug. (42 days)	18 days	663 030	6 Aug. '81	11 Aug. '81

Notes:

1. This table is based on data published by Labour Canada and Treasury Board.
2. This strike was a sporadic one and, for this reason, the Treasury Board has been unable to calculate the number of person-days lost.
3. Symbol (*) indicates that no agreement was signed. The previous agreement was extended by an Act of Parliament.
4. An additional 12 430 person-days were lost during the Clerical and Regulatory strike because employees in some other units refused to cross the CR unit's picket lines.

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Appendix

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CANADA

OFFICE CONSOLIDATION

Public Service Staff Relations Act

R.S., c. P-35

as amended by

1972, c. 18
1973-74, cc. 15, 52
1974-75-76, cc. 16, 49, 67, 75
1976-77, cc. 28, 33, 34
1977-78, c. 20
1978-79, c. 17

MARCH 1981

CODIFICATION ADMINISTRATIVE

Loi sur les relations de travail dans la Fonction publique

S.R., c. P-35

modifiée par

1972, c. 18
1973-74, cc. 15, 52
1974-75-76, cc. 16, 49, 67, 75
1976-77, cc. 28, 33, 34
1977-78, c. 20
1978-79, c. 17

MARS 1981

NOTE

All persons making use of this consolidation are reminded that it has no parliamentary sanction; that the amendments have been embodied only for convenience of reference, and that the original Act and amendments thereto should be consulted for all purposes of interpreting and applying the law.

REMARQUE

Nous rappelons aux lecteurs que cette codification n'a pas été soumise à la sanction du Parlement. Les modifications n'ont été incorporées à la loi que pour en faciliter la consultation. Pour interpréter et appliquer la loi, il faut se reporter aux textes tels qu'ils ont été adoptés par le Parlement.

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CHAPTER P-35

An Act respecting employer and employee relations in the Public Service of Canada

SHORT TITLE

Short title

1. This Act may be cited as the *Public Service Staff Relations Act*. 1966-67, c. 72, s. 1.

INTERPRETATION

Definitions

2. In this Act

"adjudicator" «arbitre»

"adjudicator" means a member assigned to hear and determine a reference to adjudication and includes, where the context permits, a board of adjudication established under section 93 and an adjudicator named in a collective agreement for the purposes of that agreement;

"arbitral award" «décision arbitrale»

"arbitral award" means an award made by the Board or an arbitrator appointed under section 62 in respect of a dispute;

"Arbitration Tribunal" [Repealed, 1974-75-76, c. 67, s. 1;]

"bargaining agent" «agent négociateur»

"bargaining agent" means an employee organization

(*a*) that has been certified by the Board as bargaining agent for a bargaining unit, and

(*b*) the certification of which has not been revoked;

"bargaining unit" «unité de négociation»

"bargaining unit" means a group of two or more employees that is determined, in accordance with this Act, to constitute a unit of employees appropriate for collective bargaining;

"Board" «Commission»

"Board" means the Public Service Staff Relations Board established under section 11;

"Chairman" «Président»

"Chairman" means the Chairman of the Board;

"collective agreement" «convention collective»

"collective agreement" means an agreement in writing entered into under this Act between the employer, on the one hand, and a bargaining agent, on the other hand, containing provisions respecting terms and conditions of employment and related matters;

"conciliation board" «bureau de conciliation»

"conciliation board" means a board established under section 78 for the investigation and conciliation of a dispute;

"conciliator" «conciliateur»

"conciliator" means a person appointed by the Chairman under section 52 to assist the parties to collective bargaining in reaching agreement;

CHAPITRE P-35

Loi concernant les relations entre employeur et employés dans la Fonction publique du Canada

TITRE ABRÉGÉ

Titre abrégé

1. La présente loi peut être citée sous le titre: *Loi sur les relations de travail dans la Fonction publique*. 1966-67, c. 72, art. 1.

INTERPRÉTATION

Définitions

2. Dans la présente loi

«agent négociateur» "bargaining agent"

«agent négociateur» désigne une association d'employés

a) qui a été accréditée par la Commission à titre d'agent négociateur d'une unité de négociation, et

b) dont l'accréditation n'a pas été annulée;

«arbitre» "adjudicator"

«arbitre» désigne un membre chargé d'entendre et de régler un renvoi à l'arbitrage et comprend notamment, lorsque le contexte le permet, un conseil d'arbitrage institué en vertu de l'article 93 ainsi qu'un arbitre nommé dans une convention collective aux fins de cette convention;

«association d'employés» "employee organization"

«association d'employés» désigne toute association d'employés ayant notamment pour objet la réglementation des relations entre l'employeur et ses employés aux fins de la présente loi, et l'expression comprend, sauf si le contexte exige une autre interprétation, un conseil d'associations d'employés;

«bureau de conciliation» "conciliation board"

«bureau de conciliation» désigne un bureau établi en vertu de l'article 78 pour enquêter sur un différend et concilier les parties;

«catégorie d'occupations» "occupational category"

«catégorie d'occupations» désigne l'une quelconque des catégories suivantes d'employés, savoir:

a) la catégorie des emplois scientifiques et professionnels,

b) la catégorie des emplois techniques,

c) la catégorie des emplois administratifs et du service extérieur,

d) la catégorie du soutien administratif, ou

e) la catégorie de l'exploitation,

et toute autre catégorie d'employés, dont les professions s'apparentent entre elles, que la Commission déclare être une catégorie d'occupations;

«Commission» "Board"

«Commission» désigne la Commission des relations de travail dans la Fonction publique, instituée en vertu de l'article 11;

«conciliateur» "conciliator"

«conciliateur» désigne une personne nommée par le Président en vertu de l'article 52 pour aider les parties aux négociations collectives à se mettre d'accord;

"Deputy Chairman" «Président suppléant»

"Deputy Chairman" means a Deputy Chairman of the Board;

"designated employee" «employé désigné»

"designated employee" means an employee who is agreed by the parties to collective bargaining or determined by the Board pursuant to section 79 to be a designated employee within the meaning of that section;

"dispute" «différend»

"dispute" means a dispute or difference arising in connection with the conclusion, renewal or revision of a collective agreement, in respect of which arbitration is requested pursuant to section 63 or in respect of which the establishment of a conciliation board may be requested pursuant to section 77;

"employee" «employé»

"employee" means a person employed in the Public Service, other than

(*a*) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act,

(*b*) a person locally engaged outside Canada,

(*c*) a person whose compensation for the performance of the regular duties of his position or office consists of fees of office, or is related to the revenue of the office in which he is employed,

(*d*) a person not ordinarily required to work more than one-third of the normal period for persons doing similar work,

(*e*) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that Force under terms and conditions substantially the same as those of a member thereof,

(*f*) a person employed on a casual or temporary basis, unless he has been so employed for a period of six months or more,

(*g*) a person employed by or under the Board, or

(*h*) a person employed in a managerial or confidential capacity,

and for the purposes of this definition a person does not cease to be employed in the Public Service by reason only of his ceasing to work as a result of a strike or by reason only of his discharge contrary to this or any other Act of Parliament;

"employee organization" «association d'employés»

"employee organization" means any organization of employees the purposes of which include the regulation of relations between the employer and its employees for the purposes of this Act, and includes, unless the context otherwise requires, a council of employee organizations;

"employer" «employeur»

"employer" means Her Majesty in right of Canada as represented by,

(*a*) in the case of any portion of the public service of Canada specified in Part I of Schedule I, the Treasury Board, and

(*b*) in the case of any portion of the public service of Canada specified in Part II of Schedule I, the separate employer concerned;

"grievance" «grief»

"grievance" means a complaint in writing presented in accordance with this Act by an employee on his own behalf or on behalf of himself and one or more other employees, except that

(*a*) for the purposes of any of the provisions of this Act respecting grievances, a reference to an "employee" includes a person who would be an employee but for the fact that he is a person employed in a managerial or confidential capacity, and

«convention collective» "collective agreement"

«convention collective» désigne une convention écrite, conclue en vertu de la présente loi entre l'employeur, d'une part, et un agent négociateur, d'autre part, qui renferme des dispositions concernant des conditions d'emploi et d'autres questions connexes;

«décision arbitrale» "arbitral award"

«décision arbitrale» désigne une décision rendue au sujet d'un différend par la Commission ou par un arbitre spécial nommé en vertu de l'article 62;

«différend» "dispute"

«différend» désigne un différend ou un désaccord qui survient à l'occasion de la conclusion, du renouvellement ou de la revision d'une convention collective et au sujet duquel l'arbitrage est demandé en conformité de l'article 63, ou au sujet duquel l'établissement d'un bureau de conciliation peut être demandé en conformité de l'article 77;

«employé» "employee"

«employé» désigne une personne employée dans la Fonction publique, sauf

a) une personne que le gouverneur en conseil, en vertu d'une loi du Parlement, nomme à un poste statutaire décrit dans cette loi,

b) une personne recrutée sur place hors du Canada,

c) une personne dont la rétribution pour l'exercice des fonctions normales de son poste ou de sa charge consiste en honoraires ou est en rapport avec le revenu du bureau dans lequel elle est employée,

d) une personne qui d'ordinaire n'est pas astreinte à plus du tiers de la durée normale de travail exigée des personnes exécutant des tâches semblables,

e) une personne qui est membre ou constable spécial de la Gendarmerie royale du Canada ou qui est employée par cette Gendarmerie à des conditions sensiblement les mêmes que celles qui s'appliquent à un de ses membres,

f) une personne employée à titre occasionnel ou temporaire, à moins qu'elle n'ait été ainsi employée pour une période de six mois ou plus,

g) une personne employée par la Commission ou qui relève de son autorité, ou

h) une personne préposée à la gestion ou à des fonctions confidentielles,

et, aux fins de la présente définition, une personne ne cesse pas d'être employée dans la Fonction publique du seul fait qu'elle a cessé de travailler par suite d'une grève ou du seul fait qu'elle a été congédiée contrairement à la présente loi ou à quelque autre loi du Parlement;

«employé désigné» "designated employee"

«employé désigné» signifie un employé que, conformément à l'article 79, les parties aux négociations collectives reconnaissent pour un employé désigné au sens où l'entend cet article, ou que la Commission, conformément au même article, déclare être un tel employé;

«employeur» "employer"

«employeur» désigne Sa Majesté du chef du Canada représentée,

a) dans le cas de tout élément de la fonction publique du Canada que spécifie la Partie I de l'annexe I, par le conseil du Trésor, et

b) dans le cas de tout élément de la fonction publique du Canada que spécifie la Partie II de l'annexe I, par l'employeur distinct qui est en cause;

«employeur distinct» "separate employer"

«employeur distinct» désigne tout élément de la fonction publique du Canada que spécifie à l'annexe la Partie II de l'annexe I;

(*b*) for the purposes of any of the provisions of this Act respecting grievances with respect to disciplinary action resulting in discharge or suspension, a reference to an "employee" includes a former employee or a person who would be a former employee but for the fact that at the time of his discharge or suspension he was a person employed in a managerial or confidential capacity;

"initial certification period" «période...»

"initial certification period" means, in respect of employees in any occupational category, the period ending on the day specified in Column III of Schedule II applicable to that occupational category;

"member" «membre»

"member" means a member of the Board and includes a full-time member and a part-time member;

"occupational category" «catégorie...»

"occupational category" means any of the following categories of employees, namely,

(*a*) scientific and professional,
(*b*) technical,
(*c*) administrative and foreign service,
(*d*) administrative support, or
(*e*) operational,

and any other occupationally-related category of employees determined by the Board to be an occupational category;

"occupational group" «groupe...»

"occupational group" means a group of employees specified and defined by the Public Service Commission under subsection 26(1);

"parties" «parties»

"parties" means

(*a*) in relation to collective bargaining, arbitration or a dispute, the employer and a bargaining agent, and

(*b*) in relation to a grievance, the employer and the employee who presented the grievance;

"person employed in a managerial or confidential capacity" «personne...»

"person employed in a managerial or confidential capacity", means any person who

(*a*) is employed in a position confidential to the Governor General, a Minister of the Crown, a judge of the Supreme or Federal Court of Canada, the deputy head of a department or the chief executive officer of any other portion of the Public Service, or

(*b*) is employed as a legal officer in the Department of Justice,

and includes any other person employed in the Public Service who in connection with an application for certification of a bargaining agent for a bargaining unit is designated by the Board, or who in any case where a bargaining agent for a bargaining unit has been certified by the Board is designated in prescribed manner by the employer, or by the Board on objection thereto by the bargaining agent, to be a person

(*c*) who has executive duties and responsibilities in relation to the development and administration of government programs,

(*d*) whose duties include those of a personnel administrator or who has duties that cause him to be directly involved in the process of collective bargaining on behalf of the employer,

(*e*) who is required by reason of his duties and responsibilities to deal formally on behalf of the employer with a grievance presented in accordance with the grievance process provided for by this Act,

(*f*) who is employed in a position confidential to any person described in paragraph (*b*), (*c*), (*d*) or (*e*), or

«fonction publique» "Public..."

«Fonction publique» désigne l'ensemble des postes qui sont compris dans un ministère, département ou autre élément de la fonction publique du Canada que spécifie à l'occasion l'annexe I, ou qui en relèvent;

«grève» "strike"

«grève» comprend un arrêt de travail ou un refus de travailler ou de continuer à travailler, par des employés, lié, assorti ou conforme à une entente commune, ou un ralentissement ou une autre activité concertée, de la part des employés, ayant pour objet la restriction ou la limitation du rendement;

«grief» "grievance"

«grief» désigne une plainte écrite, présentée en conformité de la présente loi par un employé pour son propre compte, ou pour son compte et celui d'un ou de plusieurs autres employés, sauf que

a) aux fins de toute disposition de la présente loi visant les griefs, la mention d'un «employé» s'applique à une personne qui serait un employé n'était-ce le fait qu'elle est préposée à la gestion, ou à des fonctions confidentielles, et

b) aux fins de toute disposition de la présente loi visant les griefs, relativement aux mesures disciplinaires portant congédiement ou suspension, la mention d'un «employé» s'applique à un ancien employé ou à une personne qui serait un ancien employé n'était-ce le fait qu'au moment de son congédiement ou de sa suspension elle était préposée à la gestion ou à des fonctions confidentielles;

«groupe d'occupations» "occupational group"

«groupe d'occupations» désigne un groupe d'employés que spécifie et définit la Commission de la Fonction publique en vertu du paragraphe 26(1);

«membre» "member"

«membre» désigne un membre de la Commission et s'entend également d'un membre à temps plein ou partiel;

«méthode de règlement des différends» "process..."

«méthode de règlement des différends» désigne l'une ou l'autre des façons suivantes de procéder pour régler un différend, savoir:

a) le renvoi du différend à l'arbitrage, ou
b) son renvoi à un bureau de conciliation;

«parties» "parties"

«parties» désigne,

a) par rapport aux négociations collectives, à un arbitrage ou à un différend, l'employeur et un agent négociateur, et

b) par rapport à un grief, l'employeur et l'employé qui a présenté le grief;

«période d'accréditation initiale» "initial..."

«période d'accréditation initiale» désigne, relativement aux employés compris dans une catégorie d'occupations quelconque, la période prenant fin le jour spécifié dans la colonne III de l'annexe II applicable à cette catégorie d'occupations;

«personne préposée à la gestion ou à des fonctions confidentielles» "person..."

«personne préposée à la gestion ou à des fonctions confidentielles» désigne toute personne qui

a) occupe un poste de confiance auprès du gouverneur général, un ministre de la Couronne, un juge de la Cour suprême ou de la Cour fédérale du Canada, le sous-chef d'un ministère ou d'un département ou le fonctionnaire administratif en chef de tout autre élément de la Fonction publique; ou

b) est employée en qualité de conseiller juridique au ministère de la Justice,

et comprend toute autre personne employée dans la Fonction publique qui, relativement à une demande d'accréditation d'un agent négociateur d'une unité de négociation, est désignée par la Commission, ou qui, chaque fois qu'un agent négociateur d'une unité de négociation a été accrédité par la Commis-

(*g*) who is not otherwise described in paragraph (*c*), (*d*), (*e*) or (*f*), but who in the opinion of the Board should not be included in a bargaining unit by reason of his duties and responsibilities to the employer;

"prescribed" «prescrit»

"prescribed" means prescribed by regulation of the Board;

"process for resolution of a dispute" «mode de règlement...»

"process for resolution of a dispute" means either of the following processes for the resolution of a dispute, namely:

(*a*) by the referral of the dispute to arbitration, or

(*b*) by the referral thereof to a conciliation board;

"Public Service" «Fonction...»

"Public Service" means the several positions in or under any department or other portion of the public service of Canada specified from time to time in Schedule I;

"remuneration" «rémunération»

"remuneration" includes a *per diem* or other allowance for the performance of the duties of a position or office;

"separate employer" «employeur distinct»

"separate employer" means any portion of the public service of Canada specified from time to time in Part II of Schedule I;

"strike" «grève»

"strike" includes a cessation of work or a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;

"Vice-Chairman" «vice-...»

"Vice-Chairman" means the Vice-Chairman of the Board. R.S., c. P-35, s. 2; 1973-74, c. 15, s. 1; 1974-75-76, c. 67, s. 1.

sion, est désignée de la manière prescrite par l'employeur, ou par la Commission lorsque l'agent négociateur s'y oppose, pour être une personne

c) qui a des fonctions et des responsabilités de direction en ce qui a trait à l'établissement et à l'application des programmes du gouvernement,

d) dont les fonctions comprennent celles d'un administrateur du personnel ou qui, par ses fonctions, est directement impliquée dans le mécanisme de la négociation collective pour le compte de l'employeur,

e) qui est tenue, en raison de ses fonctions et de ses responsabilités, de s'occuper officiellement, pour le compte de l'employeur, d'un grief présenté selon la procédure applicable aux griefs, établie en vertu de la présente loi,

f) qui occupe un poste de confiance auprès de l'une des personnes décrites aux alinéas *b*), *c*), *d*) ou *e*), ou

g) qui n'est pas autrement décrite aux alinéas *c*), *d*), *e*) ou *f*) mais qui, de l'avis de la Commission, ne devrait pas faire partie d'une unité de négociation en raison de ses fonctions et de ses responsabilités envers l'employeur;

«prescrit» signifie prescrit par règlement de la Commission;

«prescrit» "prescribed"

«Président» désigne le président de la Commission;

«Président» "Chairman"

«Président suppléant» désigne un président suppléant de la Commission;

«Président suppléant» "Deputy..."

«rémunération» comprend une allocation journalière ou autre pour l'exécution des fonctions d'un poste ou d'une charge;

«rémunération» "remuneration"

«Tribunal d'arbitrage» [Abrogé, 1974-75-76, c. 67, art. 1;]

«unité de négociation» désigne un groupe de deux ou plusieurs employés qui, en conformité de la présente loi, est déclaré constituer une unité d'employés habile à négocier collectivement;

«unité de négociation» "bargaining unit"

«vice-président» désigne le vice-président de la Commission. S.R., c. P-35, art. 2; 1973-74, c. 15, art. 1; 1974-75-76, c. 67, art. 1.

«vice-président» "Vice-Chairman"

APPLICATION

Public Service

Application to Public Service

3. This Act applies to all portions of the Public Service. 1966-67, c. 72, s. 3.

Additions to and Transfers within Schedule I

Authority to add to Schedule I

4. The Governor in Council may by order add to Part I or Part II of Schedule I, as the case may be, the name of any portion of the public service of Canada heretofore or hereafter established and not otherwise specified in Schedule I,

(*a*) to which Part V of the *Canada Labour Code* does not apply or that has been excluded from the operation of Part V of that Act, and

(*b*) in respect of which a Minister of the Crown, the Treasury Board or the Governor in Council is authorized to establish or approve some or all of the terms and conditions of employment of persons employed therein. R.S., c. P-35, s. 4; 1972, c. 18, s. 4.

CHAMP D'APPLICATION

Fonction publique

3. La présente loi s'applique à tous les éléments de la Fonction publique. 1966-67, c. 72, art. 3.

Application à la Fonction publique

Insertions et transferts dans l'annexe I

4. Le gouverneur en conseil peut, par décret, ajouter à la Partie I ou la Partie II de l'annexe I, selon le cas, le nom de tout élément de la fonction publique du Canada, déjà ou par la suite établi et non autrement spécifié à l'annexe I,

Droit d'effectuer des insertions nouvelles à l'annexe I

a) auquel ne s'applique pas la Partie V du *Code canadien du travail*, ou qui a été soustrait au régime de la Partie V de cette loi, et

b) au sujet duquel un ministre de la Couronne, le conseil du Trésor ou le gouverneur en conseil est autorisé à établir ou à approuver la totalité ou certaines des conditions d'emploi des personnes y employées. S.R., c. P-35, art. 4; 1972, c. 18, art. 4.

Authority to transfer within Schedule I

5. (1) The Governor in Council may by order delete the name of any portion of the public service of Canada specified from time to time in Schedule I, Part I or Part II thereof, and shall thereupon add the name of that portion to the other Part of Schedule I, except that where that portion

(*a*) no longer has any employees, or

(*b*) is a corporation that has been excluded from the operation of Part V of the *Canada Labour Code*,

he is not required to add the name of that portion to the other Part of Schedule I.

Where corporation deleted from one Part of Schedule I and not added to other Part

(2) Where the Governor in Council deletes from one Part of Schedule I the name of any corporation that has been excluded from the operation of Part V of the *Canada Labour Code* and does not thereupon add the name of that corporation to the other Part of Schedule I, the exclusion of that corporation from the operation of Part V of that Act ceases to have effect. R.S., c. P-35, s. 5; 1972, c. 18, s. 4.

BASIC RIGHTS AND PROHIBITIONS

Rights

Right of membership in employee organization

6. Every employee may be a member of an employee organization and may participate in the lawful activities of the employee organization of which he is a member. 1966-67, c. 72, s. 6.

Right of employer

7. Nothing in this Act shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein. 1966-67, c. 72, s. 7.

Prohibitions

Employer participation in employee organization

8. (1) No person who is employed in a managerial or confidential capacity, whether or not he is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization.

Discrimination against members and intimidation

(2) No person shall

(*a*) refuse to employ or to continue to employ any person, or otherwise discriminate against any person in regard to employment or any term or condition of employment because the person is a member of an employee organization or was or is exercising any right under this Act;

(*b*) impose any condition on an appointment or in a contract of employment or propose the imposition of any condition on an appointment or in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Act; or

(*c*) seek by intimidation, by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee

(i) to become, refrain from becoming or cease to be, or

Droit de faire des transferts à l'intérieur de l'annexe I

5. (1) Le gouverneur en conseil peut, par décret, rayer de la Partie I ou de la Partie II de l'annexe I le nom de tout élément de la fonction publique du Canada que spécifie à l'occasion cette annexe et doit alors ajouter le nom de cet élément à l'autre partie de l'annexe I. Toutefois, lorsque cet élément

a) n'a plus d'employés, ou

b) est une corporation qui a été soustraite au régime de la Partie V du *Code canadien du travail*,

il n'est pas tenu d'ajouter le nom de cet élément à l'autre partie de l'annexe I.

Cas où le nom d'une corporation est rayé d'une Partie de l'annexe I sans être ajouté à l'autre Partie

(2) Lorsque le gouverneur en conseil raye d'une Partie de l'annexe I le nom d'une corporation qui a été soustraite au régime de la Partie V du *Code canadien du travail* et qu'il n'ajoute pas alors le nom de cette corporation à l'autre Partie de l'annexe I, la soustraction de cette corporation au régime de la Partie V de cette loi devient sans effet. S.R., c. P-35, art. 5; 1972, c. 18, art. 4.

DROITS ET INTERDICTIONS DE BASE

Droits

Droit d'association

6. Tout employé peut être membre d'une association d'employés et participer à l'activité légitime de l'association d'employés dont il est membre. 1966-67, c. 72, art. 6.

Droit de l'employeur

7. Rien dans la présente loi ne doit s'interpréter comme portant atteinte au droit ou à l'autorité que possède l'employeur de déterminer comment doit être organisée la Fonction publique, d'attribuer des fonctions aux postes et de classer ces derniers. 1966-67, c. 72, art. 7.

Interdictions

Participation de l'employeur à une association d'employés

8. (1) Il est interdit à toute personne préposée à la gestion ou à des fonctions confidentielles, agissant ou non pour le compte de l'employeur, de participer à la formation ou l'administration d'une association d'employés ou à la représentation des employés par une telle association, ou de s'y immiscer.

Discrimination contre les membres; menaces dans [illegible] l'objet

(2) Nul ne peut

a) ni refuser d'employer ou de continuer à employer une personne, ni par ailleurs établir à l'égard d'une personne des distinctions injustes en ce qui concerne l'emploi ou toute condition d'emploi, parce que cette personne est membre d'une association d'employés ou a exercé ou exerce un droit quelconque que la présente loi lui accorde;

b) ni imposer ni proposer d'imposer, relativement à une nomination ou dans un contrat de travail, quelque condition tendant à empêcher un employé ou une personne en quête d'un emploi de devenir membre d'une association d'employés ou d'exercer un droit quelconque que la présente loi lui accorde; ou

c) ni chercher, par intimidation, par menace de destitution ou par d'autres représailles, par l'imposition d'une sanction pécuniaire ou autre ou par tout autre moyen, à obliger un employé

(i) à devenir, s'abstenir de devenir ou cesser d'être, ou

(ii) except as otherwise provided in a collective agreement, to continue to be,

a member of an employee organization, or to refrain from exercising any other right under this Act;

but no person shall be deemed to have contravened this subsection by reason of any act or thing done or omitted in relation to a person employed, or proposed to be employed, in a managerial or confidential capacity. 1966-67, c. 72, s. 8.

Discrimination against employee organization

9. (1) Except in accordance with this Act or any regulation, collective agreement or arbitral award, no person employed in a managerial or confidential capacity, whether or not he acts on behalf of the employer, shall discriminate against an employee organization.

Saving provision

(2) Nothing in subsection (1) shall be construed to prevent a person employed in a managerial or confidential capacity from receiving representations from, or holding discussions with, the representatives of any employee organization. 1966-67, c. 72, s. 9.

Soliciting membership during working hours

10. Except with the consent of the employer, no officer or representative of an employee organization shall attempt, on the employer's premises during the working hours of an employee, to persuade the employee to become or refrain from becoming or to continue to be or to cease to be a member of an employee organization. 1966-67, c. 72, s. 10.

PART I

PUBLIC SERVICE STAFF RELATIONS BOARD

Constitution of Board

Chairman and Members

Board established

11. (1) There shall be a Board to be called the Public Service Staff Relations Board, consisting of a Chairman, a Vice-Chairman, not less than three Deputy Chairmen and such other full-time members and such part-time members as the Governor in Council considers necessary to discharge the responsibilities of the Board.

Tenure

(2) The members of the Board shall be appointed by the Governor in Council to hold office during good behaviour for such period,

(*a*) not exceeding ten years, in the case of the Chairman, the Vice-Chairman and the Deputy Chairmen, and

(*b*) not exceeding seven years, in the case of any member other than a member referred to in paragraph (*a*),

as may be determined by the Governor in Council.

Appointments to be made from names on list prepared by Chairman

(3) Whenever the Governor in Council intends to appoint a member other than the Chairman, the Vice-Chairman or a Deputy Chairman, the appointment shall be made from among eligible persons whose names are included in a list, prepared by the Chairman after consultation with the employer and the bargaining agents, in which the Chairman shall include

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(ii) sauf dispositions différentes contenues dans une convention collective, à continuer d'être

membre d'une association d'employés, ou à s'abstenir d'exercer tout autre droit que la présente loi lui accorde;

mais nul n'est censé avoir contrevenu au présent paragraphe en raison de toute action ou chose faite ou omise par rapport à une personne préposée à la gestion ou à des fonctions confidentielles ou dont l'emploi en cette qualité est proposé. 1966-67, c. 72, art. 8.

Discrimination à l'encontre d'une association d'employés

9. (1) Sauf en conformité de la présente loi ou de quelque règlement, convention collective ou décision arbitrale, nulle personne préposée à la gestion ou à des fonctions confidentielles, agissant ou non pour le compte de l'employeur, ne doit établir de distinction injuste à l'endroit d'une association d'employés.

Réserve

(2) Rien au paragraphe (1) ne doit s'interpréter comme empêchant une personne préposée à la gestion ou à des fonctions confidentielles de recevoir les observations des représentants d'une association d'employés ou de discuter avec eux. 1966-67, c. 72, art. 9.

Affiliation sollicitée au cours du travail

10. Sauf avec le consentement de l'employeur, aucun dirigeant ni représentant d'une association d'employés ne doit essayer, dans les locaux de l'employeur au cours des heures de travail d'un employé, d'amener l'employé à devenir, à s'abstenir de devenir, à continuer ou cesser d'être membre d'une association d'employés. 1966-67, c. 72, art. 10.

PARTIE I

COMMISSION DES RELATIONS DE TRAVAIL DANS LA FONCTION PUBLIQUE

Constitution de la Commission

Président et membres

Création d'une Commission

11. (1) Est instituée une Commission, appelée Commission des relations de travail dans la Fonction publique, composée d'un Président, d'un vice-président, de trois présidents suppléants au moins et d'autant de membres à temps plein ou partiel que le gouverneur en conseil estime nécessaires pour permettre à la Commission de s'acquitter de ses fonctions.

Durée du mandat

(2) Le gouverneur en conseil nomme les membres de la Commission qui exercent leurs fonctions à titre inamovible et fixe la durée de leur mandat qui ne peut dépasser

a) dix ans pour le Président, le vice-président et les présidents suppléants, et

b) sept ans pour les membres autres que ceux visés à l'alinéa *a*).

Choix obligatoire sur la liste dressée par le Président

(3) Lorsqu'il a l'intention de nommer un membre, à l'exclusion du Président, du vice-président ou d'un président suppléant, le gouverneur en conseil doit choisir parmi les noms des personnes admissibles figurant sur la liste que le Président a dressée après consultation de l'employeur et des agents négociateurs et dans laquelle il a inclus

(*a*) the names of any eligible persons recommended to the Chairman by the employer or by a bargaining agent; and

(*b*) the names of any other eligible persons whom the Chairman considers suitable for appointment as a member.

(4) [Repealed, 1974-75-76, c. 67, s. 2.]

Re-appointment of members

(5) A retiring Chairman, Vice-Chairman, Deputy Chairman or other member may be re-appointed to the Board in the same or another capacity. R.S., c. P-35, s. 11; 1973-74, c. 15, s. 2; 1974-75-76, c. 67, s. 2.

Powers, etc., of part-time members

11.1 A part-time member shall exercise such powers, duties and functions of the Board in any proceeding under this Act as may be assigned to him by the Board. 1974-75-76, c. 67, s. 3.

Vice-Chairman

12. If the Chairman is absent or unable to act or the office of Chairman is vacant, the Vice-Chairman shall act as Chairman, and while he is so acting the Vice-Chairman has and may exercise all of the powers and functions of the Chairman under this Act. 1966-67, c. 72, s. 12.

12.1 [Repealed, 1974-75-76, c. 67, s. 4.]

Qualifications for Membership

Qualifications

13. (1) A person is not eligible to hold office as a member of the Board if

(*a*) he is not a Canadian citizen;

(*b*) he holds any other office or employment under the employer;

(*c*) he is a member of or holds an office or employment under an employee organization that is a bargaining agent; or

(*d*) he has attained the age of seventy years.

Exception

(2) Where a member ceases to be a member for any reason specified in subsection (1) or for any other reason other than for cause, he may, notwithstanding anything in this Act, carry out and complete any duties or responsibilities that he would otherwise have had if he had not ceased to be a member in connection with any matter

(*a*) that came before the Board while he was still a member thereof; and

(*b*) in respect of which there was any proceeding in which he participated as a member. R.S., c. P-35, s. 13; 1974-75-76, c. 67, s. 5.

Remuneration

Remuneration

14. Every member and every person referred to in subsection 13(2) who carries out duties or responsibilities under this Act

(*a*) shall be paid such salary or other remuneration as may be determined by the Governor in Council; and

(*b*) is entitled to be paid reasonable travelling and other expenses incurred by him while absent from his ordinary place of residence in the course of his duties under this Act. R.S., c. P-35, s. 14; 1973-74, c. 15 s. 4; 1974-75-76, c. 67, s. 6.

a) les noms des personnes admissibles qui lui ont été recommandées par l'employeur ou un agent négociateur; et

b) les noms d'autres personnes admissibles qu'il estime aptes à être nommées membres.

(4) [Abrogé, 1974-75-76, c. 67, art. 2.]

Nouvelle nomination des membres

(5) Un Président, un vice-président, un président suppléant ou un autre membre sortant peut de nouveau être nommé membre de la Commission, au même ou à un autre titre. S.R., c. P-35, art. 11; 1973-74, c. 15, art. 2; 1974-75-76, c. 67, art. 2.

Pouvoirs des membres à temps partiel

11.1 Les membres à temps partiel exercent, dans les procédures engagées en application de la présente loi, les pouvoirs et fonctions de la Commission que celle-ci peut leur conférer. 1974-75-76, c. 67, art. 3.

Vice-président

12. En cas d'absence ou d'empêchement du Président, ou de vacance à la présidence, le vice-président fait fonction de Président. Pendant qu'il agit à ce titre, le vice-président détient et peut exercer tous les pouvoirs et fonctions que la présente loi confère au Président. 1966-67, c. 72, art. 12.

Président suppléant

12.1 [Abrogé, 1974-75-76, c. 67, art. 4.]

Conditions d'admissibilité

Qualités requises

13. (1) Nul n'est admissible à une charge de membre de la Commission

a) s'il n'est pas citoyen canadien;

b) s'il occupe une autre charge ou un autre emploi qui relève de l'employeur;

c) s'il est membre d'une association d'employés qui est agent négociateur, ou s'il occupe une charge ou un emploi qui relève d'une telle association; ou

d) s'il a atteint l'âge de soixante-dix ans.

Exception

(2) Tout membre, pour une raison prévue au paragraphe (1) ou pour toute autre raison sauf pour cause, qui cesse de faire partie de la Commission peut, nonobstant la présente loi, s'acquitter intégralement des fonctions ou responsabilités qui lui auraient été attribuées s'il n'avait pas cessé d'être membre, en ce qui concerne toute question

a) qui a été soumise à la Commission pendant qu'il en était encore membre; et

b) relativement à laquelle il y a eu des délibérations auxquelles il a participé en qualité de membre. S.R., c. P-35, art. 13; 1974-75-76, c. 67, art. 5.

Rémunération

Rémunération

14. Les membres et les personnes visées au paragraphe 13(2) qui s'acquittent des fonctions ou responsabilités que leur confère la présente loi

a) reçoivent le traitement ou toute autre forme de rémunération que détermine le gouverneur en conseil; et

b) ont droit au remboursement des frais de déplacement et autres qu'ils ont supportés lors de l'exécution des fonctions que leur confère la présente loi hors de leur lieu ordinaire de résidence. S.R., c. P-35, art. 14; 1973-74, c. 15, art. 4; 1974-75-76, c. 67, art. 6.

Head Office and Meetings

Head office

15. (1) The head office of the Board shall be at the city of Ottawa.

Time and place of meetings

(2) The Board may meet at such times and places as it considers necessary or desirable for the proper conduct of its business. 1966-67, c. 72, s. 15.

Quorum

16. (1) At any meeting of the Board for the conduct of its business, other than a proceeding before the Board, at least the following members shall be present, namely,

(*a*) the Chairman or the Vice-Chairman;

(*b*) one Deputy Chairman; and

(*c*) a majority of the other full-time members.

Part-time members not entitled to attend certain Board meetings

(2) Unless the Board invites a part-time member to attend a meeting of the Board called for the conduct of its business, he is not entitled to attend except where there is a proceeding before the Board and he is one of the persons constituting the Board or division thereof for the purposes of the proceeding.

Board may constitute divisions

(3) The Board may establish divisions of the Board consisting of one or more persons chosen from among the members.

Board may direct matters to divisions of Board

(4) For the purpose of facilitating the hearing or determination of any matter by the Board in a proceeding, the Board may direct, either generally or in any particular case or class of cases, that the powers, duties and functions of the Board under this Act shall be exercised and performed by a division of the Board.

Decision of majority

(5) Subject to subsection 71(2), a decision of the majority of the persons constituting the Board or a division thereof who are present at any meeting of the Board or division thereof when the decision is taken is a decision of the Board or the division thereof, as the case may be. R.S., c. P-35, s. 16; 1973-74, c. 15, s. 5; 1974-75-76, c. 67, s. 7.

Staff and Experts

Chief executive officer

17. (1) The Chairman is the chief executive officer of the Board.

Appointment of secretary

(2) A secretary of the Board shall be appointed under the *Public Service Employment Act* who shall, subject to the direction of the Chairman, have supervision over and direction of the work and staff of the Board.

Other staff

(3) Such other officers and employees as the Board deems necessary for the performance of its duties shall be appointed under the *Public Service Employment Act*.

Appointment of experts and advisers

(4) The Chairman may appoint and, subject to the approval of the Governor in Council, fix the remuneration of conciliators and other experts or persons having technical or special knowledge to assist the Board in an advisory capacity. 1966-67, c. 72, s. 17.

Powers and Duties of the Board

Powers and duties of the Board

18. The Board shall administer this Act and shall exercise such powers and perform such duties as are conferred or imposed upon it by, or as may be incidental to the attainment of the objects of, this Act including, without restricting the generality of the foregoing, the making of orders requiring compliance with this Act,

Siège et réunions

Siège

15. (1) Le siège de la Commission est établi en la ville d'Ottawa.

Temps et lieu de réunion

(2) La Commission peut se réunir aux temps et lieux qu'elle considère nécessaires ou désirables pour la bonne marche de ses affaires. 1966-67, c. 72, art. 15.

Quorum

16. (1) A toute réunion de la Commission tenue pour l'expédition de ses affaires, sauf lors d'une procédure dont elle est saisie, les membres suivants au moins doivent être présents:

a) le Président ou le vice-président;

b) un président suppléant; et

c) la majorité des autres membres à temps plein.

Inadmissibilité des membres à temps partiel à certaines réunions de la Commission

(2) Les membres à temps partiel ne participent aux réunions que tient la Commission pour l'expédition de ses affaires que si celle-ci les y invite, mais peuvent y assister lorsque la Commission est saisie d'une procédure et qu'ils font partie de la Commission ou de la division siégeant pour cette procédure.

Création de divisions

(3) La Commission peut créer des divisions composées d'une ou de plusieurs personnes choisies parmi ses membres.

Renvoi aux divisions

(4) Afin de faciliter l'audition ou le règlement de toute affaire par la Commission dans une procédure, la Commission peut ordonner, en règle générale ou dans un cas particulier ou dans une catégorie particulière de cas, que les pouvoirs, devoirs et fonctions que lui attribuent la présente loi soient exercés par une de ses divisions.

Décision de la majorité

(5) Sous réserve du paragraphe 71(2), une décision prise par la majorité des personnes qui constituent la Commission ou une de ses divisions et qui sont présentes à une de leurs réunions constituée, lorsqu'elle est prise, une décision de la Commission ou de ladite division, selon le cas. S.R., c. P-35, art. 16; 1973-74, c. 15, art. 5; 1974-75-76, c. 67, art. 7.

Personnel et experts

Fonctionnaire administratif en chef

17. (1) Le Président est le fonctionnaire administratif en chef de la Commission.

Nomination d'un secrétaire

(2) Doit être nommé, conformément à la *Loi sur l'emploi dans la Fonction publique*, un secrétaire de la Commission qui, sous la direction du Président, surveille et dirige l'activité et le personnel de la Commission.

Autre personnel

(3) Les autres fonctionnaires et employés que la Commission juge nécessaires à l'exercice de ses fonctions sont nommés en vertu de la *Loi sur l'emploi dans la Fonction publique*.

Nomination de conciliateurs et de conseillers

(4) Le Président peut nommer des conciliateurs et autres experts ou personnes possédant des connaissances techniques ou spéciales pour assister la Commission à titre consultatif et, sous réserve de l'approbation du gouverneur en conseil, fixer leur rémunération. 1966-67, c. 72, art. 17.

Pouvoirs et fonctions de la Commission

Pouvoirs et fonctions de la Commission

18. La Commission applique la présente loi et exerce les pouvoirs et fonctions que celle-ci lui confère ou impose ou qui sont accessoires à la réalisation des objets de la présente loi, y compris, sans restreindre la généralité de ce qui précède, l'établissement d'ordonnances exigeant l'observation des dispositions de la présente loi, with any regulation made hereunder or with any decision made in respect of a matter coming before it. 1966-67, c. 72, s. 18.

Delegation of powers to Vice-Chairman and Deputy Chairman

18.1 The Vice-Chairman and each Deputy Chairman may exercise such of the powers, duties and functions of the Board under this Act as may be assigned to them by the Board other than the power to make regulations of general application under section 19. 1974-75-76, c. 67, s. 8.

Authority of Board to make regulations

19. (1) The Board may make regulations of general application respecting

(*a*) the manner in which persons shall be designated by the employer, or by the Board on objection thereto by a bargaining agent, to be persons described in paragraphs (*c*) to (*g*) of the definition of "person employed in a managerial or confidential capacity" in section 2;

(*b*) the determination of units of employees appropriate for collective bargaining;

(*c*) the certification of bargaining agents for bargaining units and the hearing or determination of applications to record alterations in the process for resolution of disputes applicable to bargaining units;

(*d*) [Repealed, 1974-75-76, c. 67, s. 9;]

(*e*) the hearing or determination of any matter relating to or arising out of the revocation of certification of a bargaining agent, including the rights and privileges that have accrued to and are retained by any employee notwithstanding such revocation;

(*f*) the rights, privileges and duties that are acquired or retained by an employee organization in respect of a bargaining unit or any employee included therein where there is a merger, amalgamation or transfer of jurisdiction between two or more such organizations;

(*g*) the establishment of rules of procedure for its hearings and those of an adjudicator;

(*h*) the specification of the time within which and the persons to whom notices and other documents shall be sent and when such notices shall be deemed to have been given and received;

(*i*) the determination of the form in which, and the time as of which, evidence

(i) as to membership of employees in an employee organization,

(ii) of objection by employees to certification of an employee organization, or

(iii) of signification by employees that they no longer wish to be represented by an employee organization

shall be presented to the Board upon an application for certification of or for revocation of certification of a bargaining agent, and the circumstances in which evidence as to membership of employees in an employee organization may be received by the Board as evidence that such employees wish that employee organization to represent them as their bargaining agent;

(*j*) the hearing of complaints under section 20;

(*k*) the authority vested in a council of employee organizations that shall be considered appropriate authority within the meaning of paragraph 28(2)(*b*); and

(*l*) such other matters and things as may be incidental or conducive to the objects and

de tout règlement édicté en vertu de la présente loi ou de toute décision rendue à l'égard d'une question soumise à la Commission. 1966-67, c. 72, art. 18.

Délégation de pouvoirs au vice-président et aux présidents suppléants

18.1 Le vice-président et les présidents suppléants peuvent exercer les pouvoirs et fonctions que la présente loi confère à la Commission et que celle-ci leur attribue, à l'exclusion du pouvoir d'édicter des règlements d'application générale en vertu de l'article 19. 1974-75-76, c. 67, art. 8.

La Commission peut établir des règlements

19. (1) La Commission peut établir des règlements d'application générale concernant

a) la manière dont certaines personnes doivent être désignées par l'employeur, ou par la Commission lorsque l'agent négociateur s'oppose à leur désignation par l'employeur, pour être des personnes décrites aux alinéas *c*) à *g*) à la définition de «personne préposée à la gestion ou à des fonctions confidentielles» dans l'article 2;

b) la détermination de la composition des unités d'employés habiles à négocier collectivement;

c) l'accréditation d'agents négociateurs d'unités de négociation et l'audition ou la décision des demandes pour que soient consignées les modifications dans la méthode de règlement des différends, applicable aux unités de négociations;

d) [Abrogé, 1974-75-76, c. 67, art. 9;]

e) l'audition ou la décision de toute question relative ou consécutive à l'annulation de l'accréditation d'un agent négociateur et, notamment, aux droits et privilèges qu'un employé a acquis et qu'il conserve nonobstant cette annulation;

f) les droits, privilèges et fonctions qui sont acquis ou conservés par une association d'employés, relativement à une unité de négociation ou à tout employé compris dans celle-ci lorsque se produit une fusion ou un transfert de compétence entre deux ou plusieurs semblables associations;

g) l'établissement de règles de procédure pour ses auditions et pour celles d'un arbitre;

h) la spécification du délai d'envoi des avis et autres documents, ainsi que des personnes à qui ils doivent être envoyés et de la date où ces avis sont censés avoir été donnés et reçus;

i) la détermination de la forme dans laquelle, et du moment à compter duquel, la preuve

(i) d'affiliation d'employés à une association d'employés,

(ii) d'opposition par les employés à l'accréditation d'une association d'employés, ou

(iii) de signification par ces employés qu'ils ne veulent plus être représentés par une association d'employés

doit être présentée à la Commission à la suite d'une demande d'accréditation ou de révocation de l'accréditation d'un agent négociateur, ainsi que les circonstances où la Commission peut admettre la preuve de l'affiliation d'employés à une association d'employés comme preuve que ces employés désirent être représentés par cette association d'employés agissant à titre d'agent négociateur;

j) l'audition des plaintes aux termes de l'article 20;

k) l'autorité dévolue à un conseil d'associapurposes of the Board, the exercise of its powers and the attainment of the objects of this Act.

When regulations effective

(2) Regulations of general application made under subsection (1) have effect upon publication in the *Canada Gazette*. R.S., c. P-35, s. 19; 1974-75-76, c. 67, s. 9.

Complaints

20. (1) The Board shall examine and inquire into any complaint made to it that the employer, or any person acting on its behalf, or that an employee organization, or any person acting on its behalf, has failed

(*a*) to observe any prohibition contained in section 8, 9 or 10;

(*b*) to give effect to any provision of an arbitral award;

(*c*) to give effect to a decision of an adjudicator with respect to a grievance; or

(*d*) to comply with any regulation respecting grievances made by the Board pursuant to section 99.

Order of Board directing compliance

(2) Where under subsection (1) the Board determines that any person has failed to observe any prohibition, to give effect to any provision or decision or to comply with any regulation as described in subsection (1), it may make an order, addressed to that person, directing him to observe the prohibition, give effect to the provision or decision or comply with the regulation, as the case may be, or take such action as may be required in that behalf within such specified period as the Board may consider appropriate and,

(*a*) where that person has acted or purported to act on behalf of the employer, it shall direct its order as well

(i) in the case of a separate employer, to the chief executive officer thereof, and

(ii) in any other case, to the Secretary of the Treasury Board; and

(*b*) where that person has acted or purported to act on behalf of an employee organization, it shall direct its order as well to the chief officer of that employee organization. 1966-67, c. 72, s. 20.

Where order not complied with

21. Where any order made under section 20 directs some action to be taken and is not complied with within the period specified in the order for the taking of such action, the Board shall forward to the Minister through whom it reports to Parliament a copy of its order, a report of the circumstances and all documents relevant thereto, and the copy of the order, the report and the relevant documents shall be laid by the Minister before Parliament within fifteen days after receipt thereof by him or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting. 1966-67, c. 72, s. 21.

Powers of Board in proceedings

22. The Board has, in relation to the hearing or determination of any proceeding before it, power

tions d'employés qui doit être considérée comme l'autorité appropriée au sens où l'entend l'alinéa 28(2)*b*); et

f) telles autres questions et sujets qui peuvent se rattacher ou contribuer aux objets et aux fins de la Commission, à l'exercice de ses pouvoirs et à la réalisation des objets de la présente loi.

Entrée en vigueur des règlements

(2) Les règlements d'application générale établis en vertu du paragraphe (1) prennent effet dès leur publication dans la *Gazette du Canada*. S.R., c. P-35, art. 19; 1974-75-76, c. 67, art. 9.

Plaintes

20. (1) La Commission doit se renseigner et enquêter sur toute plainte à elle faite portant que l'employeur ou une personne agissant pour son compte, ou une association d'employés ou une personne agissant pour son compte a omis

a) d'observer les interdictions prévues par les articles 8, 9 ou 10;

b) de donner effet à une disposition d'une décision arbitrale;

c) de donner effet à une décision d'un arbitre relative à un grief; ou

d) de se conformer à tout règlement relatif aux griefs, établi par la Commission conformément à l'article 99.

Ordonnance d'exécution de la Commission

(2) Lorsque, en vertu du paragraphe (1), la Commission décide qu'une personne n'a pas observé une interdiction, n'a pas donné effet à une disposition ou à une décision ou ne s'est pas conformée à un règlement décrit au paragraphe (1), elle peut rendre une ordonnance, adressée à cette personne, lui enjoignant d'observer cette interdiction, de donner effet à la disposition ou à la décision ou de se conformer au règlement, selon le cas, ou de prendre toute mesure requise à cet effet dans le délai que la Commission estime approprié et,

a) lorsque la personne a agi ou a prétendu agir pour le compte de l'employeur, la Commission doit aussi adresser son ordonnance,

(i) dans le cas d'un employeur distinct, au fonctionnaire administratif en chef de cet employeur, et

(ii) dans tout autre cas, au secrétaire du conseil du Trésor; et

b) lorsque la personne a agi ou a prétendu agir pour le compte d'une association d'employés, la Commission doit aussi adresser son ordonnance au dirigeant en chef de cette association d'employés. 1966-67, c. 72, art. 20.

Inexécution de l'ordonnance

21. Lorsque, selon une ordonnance rendue en vertu de l'article 20, une initiative quelconque doit être prise et ne l'est pas dans le délai prévu à cette fin, la Commission doit transmettre au Ministre, par l'intermédiaire de qui elle rend compte au Parlement, une copie de son ordonnance, un exposé des circonstances et tous les documents y relatifs. Le Ministre doit déposer au Parlement la copie de l'ordonnance, l'exposé et les documents y relatifs, dans les quinze jours qui suivent le jour où il les a reçus ou, si le Parlement n'est pas alors en session, l'un des quinze premiers jours où le Parlement siège par la suite. 1966-67, c. 72, art. 21.

Pouvoirs de la Commission lors des procédures

22. En ce qui concerne l'audition ou le règlement de toute procédure dont elle est saisie, la Commission a le pouvoir (*a*) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the Board deems requisite to the full investigation and consideration of matters within its jurisdiction in the same manner and to the same extent as a superior court of record;

(*b*) to administer oaths and affirmations;

(*c*) to receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it sees fit, whether admissible in a court of law or not and, without limiting the generality of the foregoing, the Board may refuse to accept any evidence that is not presented in the form and as of the time prescribed;

(*d*) to require the employer to post and keep posted in appropriate places any notices that the Board deems necessary to bring to the attention of any employees any matter or proceeding before the Board;

(*e*) subject to such limitations as the Governor in Council in the interests of defence or security may prescribe, to enter any premises of the employer where work is being or has been done by employees and to inspect and view any work, material, machinery, appliances or articles therein and interrogate any person respecting any matter;

(*f*) to enter upon the employer's premises for the purpose of conducting representation votes during working hours; and

(*g*) to authorize any person to do anything that the Board may do under paragraphs (*b*) to (*f*) and to report to the Board thereon. R.S., c. P-35, s. 22; 1974-75-76, c. 67, s. 10.

a) de convoquer des témoins, de les contraindre à comparaître et à déposer sous serment oralement ou par écrit ainsi qu'à produire les documents et choses que la Commission estime indispensables pour l'enquête et l'examen complets, relatifs aux questions de sa compétence, de la même façon et dans la même mesure qu'une cour supérieure d'archives;

b) de faire prêter serment et de recevoir les affirmations solennelles;

c) de recevoir et accepter, sous serment, par affidavit ou autrement, les témoignages et les renseignements qu'à sa discrétion elle juge appropriés, qu'ils soient admissibles ou non devant une cour de justice; sans restreindre la généralité de ce qui précède, la Commission peut refuser d'accepter toute preuve qui n'est pas présentée dans la forme et à l'époque prescrites;

d) d'exiger de l'employeur qu'il affiche et maintienne affichés aux endroits appropriés les avis que la Commission estime nécessaire de porter à l'attention des employés au sujet de toute question ou procédure devant la Commission;

e) sous réserve des limitations que le gouverneur en conseil peut prescrire dans l'intérêt de la défense ou de la sécurité, de pénétrer dans des locaux ou sur des terrains de l'employeur où les employés travaillent ou ont travaillé, d'inspecter et examiner tout travail, matériau, outillage, appareil ou article s'y trouvant et d'interroger toute personne à quelque sujet que ce soit;

f) de pénétrer dans les locaux ou sur les terrains de l'employeur pour y diriger des scrutins de représentation pendant les heures de travail; et

g) d'autoriser quiconque à faire tout ce que la Commission peut accomplir aux termes des alinéas *b*) à *f*) et à faire à ce sujet rapport à la Commission. S.R., c. P-35, art. 22; 1974-75-76, c. 67, art. 10.

23. [Repealed, 1974-75-76, c. 67, s. 11.]

23. [Abrogé, 1974-75-76, c. 67, art. 11.]

Application of orders

24. Where under this Act the Board may make or issue any order or direction, prescribe any term or condition or do any other thing in relation to any person, the Board may do so, either generally or in any particular case or class of cases. 1966-67, c. 72, s. 24.

24. Lorsque la Commission peut, aux termes de la présente loi, rendre une ordonnance ou donner des directives, prescrire une modalité ou faire toute autre chose en ce qui concerne une personne quelconque, la Commission peut le faire soit de façon générale, soit dans tout cas particulier ou toute catégorie particulière de cas. 1966-67, c. 72, art. 24.

Application des ordonnances

Review or amendment of orders

25. The Board may review, rescind, amend, alter or vary any decision or order made by it, or may rehear any application before making an order in respect thereof, except that any rights acquired by virtue of any decision or order that is so reviewed, rescinded, amended, altered or varied shall not be altered or extinguished with effect from a day earlier than the day on which such review, rescission, amendment, alteration or variation is made. 1966-67, c. 72, s. 25.

25. La Commission peut examiner de nouveau, annuler ou modifier toute décision ou ordonnance qu'elle a rendue, ou procéder à une nouvelle audition de toute demande avant de rendre une ordonnance à son sujet. Toutefois les droits acquis en raison d'une décision ou d'une ordonnance ainsi examinée de nouveau, annulée ou modifiée ne peuvent faire l'objet d'une modification ou abolition qui prendrait effet avant la date de ce nouvel examen, de cette annulation ou de cette modification. 1966-67, c. 72, art. 25.

Révision ou modification des ordonnances

PART II

COLLECTIVE BARGAINING AND COLLECTIVE AGREEMENTS

Commencement of Collective Bargaining

Specification of occupational groups

26. (1) The Public Service Commission shall, within fifteen days after the 13th day of March 1967, specify and define the several occupational groups within each occupational category enumerated in paragraphs (*a*) to (*e*) of the definition "occupational category" in section 2, in such manner as to comprise therein all employees in the Public Service in respect of whom Her Majesty as represented by the Treasury Board is the employer, and shall thereupon cause notice of its action and of the occupational groups so specified and defined by it to be published in the *Canada Gazette*.

Groups specified on basis of program of classification revision

(2) The Public Service Commission, in specifying and defining the several occupational groups within each occupational category pursuant to subsection (1), shall specify and define those groups on the basis of the grouping of positions and employees, according to the duties and responsibilities thereof, under the program of classification revision undertaken by the Civil Service Commission prior to the 13th day of March 1967.

When application for certification may be made

(3) As soon as possible after the 13th day of March 1967 the Board shall, for each occupational category, specify the day on and after which an application for certification as bargaining agent for a bargaining unit comprised of employees included in that occupational category may be made by an employee organization, which day shall not, for any occupational category, be later than the sixtieth day after the 13th day of March 1967.

Bargaining units during initial certification period

(4) During the initial certification period, a unit of employees in respect of whom Her Majesty as represented by the Treasury Board is the employer may be determined by the Board as a unit appropriate for collective bargaining only if that unit is comprised of

(*a*) all of the employees in an occupational group;

(*b*) all of the employees in an occupational group other than employees whose duties include the supervision of other employees in that occupational group; or

(*c*) all of the employees in an occupational group whose duties include the supervision of other employees in that occupational group.

Where objection filed

(5) Subsection (4) does not apply where, upon an application for certification as bargaining agent for a proposed bargaining unit,

(*a*) the employee organization making the application, or any employee organization whose members include employees in the proposed bargaining unit, has filed with the Board an objection to the determination of a bargaining unit in consequence of the application on the basis specified in subsection (4), on the ground that such a bargaining unit would not permit satisfactory representation of employees included therein and, for that reason, would not constitute a unit of employees appropriate for collective bargaining; and

(*b*) the Board, after considering the objection, is satisfied that such a bargaining unit would not, for that reason, constitute a unit

PARTIE II

NÉGOCIATIONS COLLECTIVES ET CONVENTIONS COLLECTIVES

Ouverture des négociations collectives

Détermination des groupes d'occupations

26. (1) La Commission de la Fonction publique doit, dans les quinze jours qui suivent le 13 mars 1967, spécifier et définir les divers groupes d'occupations qui constituent chacune des catégories d'occupations énumérées aux alinéas *a*) à *e*) de la définition de «catégorie d'occupations» dans l'article 2, de manière à y inclure tous les employés de la Fonction publique dont Sa Majesté représentée par le conseil du Trésor est l'employeur. La Commission doit alors faire publier un avis de son action et des groupes d'occupations ainsi spécifiés et définis par elle dans la *Gazette du Canada*.

Les groupes doivent être définis d'après le programme de revision de la classification

(2) La Commission de la Fonction publique, en spécifiant et définissant les divers groupes d'occupations qui constituent chacune des catégories d'occupations en conformité du paragraphe (1), doit spécifier et définir ces groupes d'après le groupement des postes et des employés, selon leurs fonctions et responsabilités, effectué en vertu du programme de revision de la classification entrepris par la Commission du Service civil avant le 13 mars 1967.

Quand la demande d'accréditation doit être faite

(3) Dès que possible après le 13 mars 1967, la Commission doit, pour chaque catégorie d'occupations, spécifier le jour à compter duquel une association d'employés peut présenter une demande d'accréditation à titre d'agent négociateur pour une unité de négociation formée d'employés de cette catégorie d'occupations. Ce jour ne doit, pour aucune catégorie d'occupations, être postérieur au soixantième jour qui suit le 13 mars 1967.

Unités de négociation pendant la période initiale d'accréditation

(4) Pendant la période d'accréditation initiale, la Commission ne peut décider qu'une unité d'employés dont Sa Majesté, représentée par le conseil du Trésor, est l'employeur constitue une unité habile à négocier collectivement que si cette unité est formée de

a) tous les employés d'un groupe d'occupations;

b) tous les employés d'un groupe d'occupations autres que les employés dont les fonctions comprennent la surveillance d'autres employés de ce groupe d'occupations; ou

c) tous les employés d'un groupe d'occupations dont les fonctions comprennent la surveillance d'autres employés de ce groupe d'occupations.

Si une opposition est produite

(5) Le paragraphe (4) ne s'applique pas lorsque, lors d'une demande d'accréditation d'un agent négociateur pour une unité de négociation proposée,

a) l'association d'employés qui fait la demande, ou toute association d'employés dont les membres comprennent des employés de l'unité de négociation proposée, a produit à la Commission une opposition à la détermination d'une unité de négociation en conséquence de la demande fondée sur la base spécifiée au paragraphe (4), pour le motif que cette unité de négociation ne permettrait pas une représentation satisfaisante des employés qui y sont compris et, pour cette raison, ne constituerait pas une unité d'employés habile à négocier collectivement; et que

b) la Commission, après avoir considéré l'opof employees appropriate for collective bargaining.

Commencement of collective bargaining during initial certification period

(6) During the initial certification period, in respect of each occupational category,

(*a*) notice to bargain collectively may be given in respect of a bargaining unit comprised of employees included in that occupational category only after the day specified in Column I of Schedule II applicable to that occupational category; and

(*b*) a collective agreement may be entered into or an arbitral award rendered in respect of a bargaining unit comprised of employees included in that occupational category only after the day specified in Column II of Schedule II applicable to that occupational category,

and any collective agreement entered into or arbitral award rendered during the initial certification period in respect of a bargaining unit comprised of employees included in that occupational category shall remain in effect until the day specified in Column III of Schedule II applicable to that occupational category, and no longer.

Other occupational categories

(7) Where, during the initial certification period, an occupationally-related category of employees is determined by the Board to be an occupational category for the purposes of this Act, the Board shall, at the time of making the determination,

(*a*) specify the day corresponding to that described in subsection (3) which shall apply in relation to that occupational category as though it were specified by the Board under that subsection; and

(*b*) specify the days corresponding to those described in Columns I, II and III of Schedule II which shall apply in relation to that occupational category as though they were specified in Columns I, II and III of Schedule II, respectively. 1966-67, c. 72, s. 26.

Certification of Bargaining Agents

Application for Certification

Application by employee organization

27. An employee organization seeking to be certified as bargaining agent for a group of employees that it considers constitutes a unit of employees appropriate for collective bargaining may, subject to section 30, apply in the manner prescribed to the Board for certification as bargaining agent for the proposed bargaining unit. 1966-67, c. 72, s. 27.

Application by council of organizations

28. (1) Where two or more employee organizations have come together to form a council of employee organizations, the council so formed may, subject to section 30, apply in the manner prescribed to the Board for certification as described in section 27.

Conditions for certification of council

(2) The Board may certify a council of employee organizations as bargaining agent for a bargaining unit where the Board is satisfied that

(*a*) the requirements for certification established by this Act are met; and

position, est convaincue qu'une semblable unité de négociation ne constituerait pas, pour cette raison, une unité d'employés habile à négocier collectivement.

Début des négociations collectives pendant la période d'accréditation initiale

(6) Pendant la période d'accréditation initiale, en ce qui concerne chaque catégorie d'occupations,

a) avis de négocier collectivement ne peut être donné relativement à une unité de négociation formée d'employés de cette catégorie d'occupations qu'après le jour spécifié à la colonne I de l'annexe II applicable à cette catégorie d'occupations; et

b) une convention collective ne peut être conclue ni une décision arbitrale rendue relativement à une unité de négociation formée d'employés de cette catégorie d'occupations qu'après le jour spécifié à la colonne II de l'annexe II applicable à cette catégorie d'occupations;

et toute convention collective conclue ou décision arbitrale rendue pendant la période d'accréditation initiale relativement à une unité de négociation formée d'employés de cette catégorie d'occupations doit rester en vigueur jusqu'au jour spécifié à la colonne III de l'annexe II applicable à cette catégorie d'occupations, et seulement jusque-là.

Autres catégories d'occupations

(7) Lorsque, pendant la période d'accréditation initiale, la Commission décide qu'une catégorie d'employés de professions connexes constitue une catégorie d'occupations aux fins de la présente loi, la Commission doit, au moment de prendre la décision,

a) spécifier le jour correspondant au jour décrit au paragraphe (3) qui doit s'appliquer à cette catégorie d'occupations comme s'il était spécifié par la Commission en vertu de ce paragraphe; et

b) spécifier les jours correspondants aux jours décrits aux colonnes I, II et III de l'annexe II qui doivent s'appliquer à cette catégorie d'occupations comme s'ils étaient spécifiés aux colonnes I, II et III de l'annexe II, respectivement. 1966-67, c. 72, art. 26.

Accréditation des agents négociateurs

Demande d'accréditation

Demande d'une association d'employés

27. Une association d'employés désirant être accréditée à titre d'agent négociateur pour un groupe d'employés qui, à son avis, constitue une unité d'employés habile à négocier collectivement peut, sous réserve de l'article 30, demander à la Commission, de la manière prescrite, d'être accréditée à titre d'agent négociateur de l'unité de négociation proposée. 1966-67, c. 72, art. 27.

Demande d'un conseil d'associations

28. (1) Lorsque deux associations d'employés ou plus se sont réunies pour former un conseil d'associations d'employés, le conseil ainsi formé peut, sous réserve de l'article 30, demander à la Commission, de l'accréditer de la manière prescrite, comme l'indique l'article 27.

Conditions d'accréditation d'un conseil

(2) La Commission peut accréditer un conseil d'associations d'employés à titre d'agent négociateur d'une unité de négociation si elle est convaincue

a) que les conditions d'accréditation imposées par la présente loi sont remplies; et (*b*) each of the employee organizations forming the council has vested appropriate authority in the council to enable it to discharge the duties and responsibilities of a bargaining agent. 1966-67, c. 72, s. 28.

Council deemed to be employee organization

29. A council of employee organizations shall, for all purposes of this Act except subsection 28(2), be deemed to be an employee organization, and membership in any employee organization that is part of a council of employee organizations shall for the same purposes be deemed to be membership in the council. 1966-67, c. 72, s. 29.

When Application for Certification may be Made

Where agreement for term of not more than two years

30. (1) Where a collective agreement or an arbitral award is in force and is for a term of not more than two years, an employee organization may apply to the Board for certification as bargaining agent for any of the employees in the bargaining unit to which the agreement or award applies only after the commencement of the last two months of its operation.

Where agreement for term of more than two years

(2) Where a collective agreement or an arbitral award is in force and is for a term of more than two years, an employee organization may apply to the Board for certification as bargaining agent for any of the employees in the bargaining unit to which the agreement or award applies only

(*a*) after the commencement of the twenty-third month of its operation and before the commencement of the twenty-fifth month of its operation;

(*b*) during the two-month period immediately preceding the end of each year that the agreement or award continues to operate after the second year of its operation; or

(*c*) after the commencement of the last two months of its operation.

Where agreement is for indefinite term

(3) Where a collective agreement referred to in subsection (1) or (2) provides that it will continue to operate after the term specified therein for a further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the collective agreement, an employee organization may apply to the Board for certification as bargaining agent for any of the employees in the bargaining unit to whom the collective agreement applies at any time permitted by subsection (1) or (2), as the case may be, or during the two-month period immediately preceding the end of each year that the collective agreement continues to operate after the term specified therein. 1966-67, c. 72, s. 30.

No certification where previous application refused within six months

31. Where an application for certification of an employee organization as bargaining agent for a proposed bargaining unit has been refused by the Board, the Board shall not certify the employee organization as bargaining agent for the same or substantially the same proposed bargaining unit until at least six months have elapsed from the day on which the Board last refused such certification, unless the Board is satisfied that the previous application was refused by reason only of a technical error or

b) que chacune des associations d'employés qui forment le conseil a donné au conseil l'autorité appropriée pour lui permettre de s'acquitter des devoirs et responsabilités d'un agent négociateur. 1966-67, c. 72, art. 28.

Le conseil est réputé une association d'employés

29. Un conseil d'associations d'employés est réputé pour tous les objets de la présente loi, sauf ceux du paragraphe 28(2), une association d'employés. L'affiliation à une association d'employés qui fait partie d'un conseil d'associations d'employés est réputée pour les mêmes objets une affiliation au conseil. 1966-67, c. 72, art. 29.

Époques où l'on peut présenter une demande d'accréditation

Cas où la durée de la convention collective ne dépasse pas deux ans

30. (1) Lorsqu'une convention collective ou une décision arbitrale d'une durée d'au plus deux ans est en vigueur, une association d'employés ne peut demander à la Commission d'être accréditée, à titre d'agent négociateur pour tout employé de l'unité de négociation à laquelle s'applique la convention ou la décision arbitrale, qu'après le début de l'avant-dernier mois d'application de ladite convention ou décision arbitrale.

Cas où la durée de la convention collective dépasse deux ans

(2) Lorsqu'une convention collective ou une décision arbitrale d'une durée de plus de deux ans est en vigueur, une association d'employés ne peut demander à la Commission d'être accréditée, à titre d'agent négociateur pour tout employé de l'unité de négociation à laquelle s'applique la convention ou la décision arbitrale, que

a) après le début du vingt-troisième mois et avant le début du vingt-cinquième mois d'application de la convention ou décision arbitrale;

b) pendant la période de deux mois qui précède immédiatement la fin de chaque année d'application de la convention ou de la décision arbitrale au-delà de la seconde année; ou

c) après le début de l'avant-dernier mois d'application de la convention.

Cas où la durée de la convention collective est indéterminée

(3) Lorsqu'une convention collective dont fait mention le paragraphe (1) ou (2) dispose qu'elle continuera d'être appliquée, après l'expiration du terme qui y est spécifié, pendant un autre terme ou plusieurs termes consécutifs si aucune des parties ne donne à l'autre un avis de dénonciation ou de son désir de négocier le renouvellement, avec ou sans modifications, de la convention collective, une association d'employés peut demander à la Commission d'être accréditée à titre d'agent négociateur pour tout employé de l'unité de négociation à laquelle s'applique la convention collective à tout moment permis par le paragraphe (1) ou le paragraphe (2), selon le cas, ou pendant la période de deux mois précédant immédiatement la fin de chacune des années d'application de la convention postérieures au terme qui y est spécifié. 1966-67, c. 72, art. 30.

Impossibilité d'accréditer dans les six mois qui suivent le rejet d'une demande antérieure

31. Si elle a rejeté la demande d'accréditation d'une association d'employés à titre d'agent négociateur d'une unité de négociation proposée, la Commission ne doit pas accréditer cette association d'employés à titre d'agent négociateur de cette même unité de négociation proposée, ou d'une unité qui est sensiblement la même, tant qu'au moins six mois ne se sont pas écoulés depuis la date où la Commission a la dernière fois refusé d'accorder cette accréditation, sauf si la Commission est convaincue que omission made in connection therewith. 1966-67, c. 72, s. 31.

Determination of Appropriate Bargaining Units

Determination of unit

32. (1) Where an employee organization has made application to the Board for certification as described in section 27, the Board shall, subject to subsection 26(4), determine the relevant group of employees that constitutes a unit appropriate for collective bargaining.

Matters to be taken into account

(2) In determining whether a group of employees constitutes a unit appropriate for collective bargaining, the Board shall take into account, having regard to the proper functioning of this Act, the duties and classification of the employees in the proposed bargaining unit in relation to any plan of classification as it may apply to the employees in the proposed bargaining unit.

Duties of employees in bargaining unit to be similar

(3) No employee may be included in a bargaining unit who is performing duties or is entrusted with responsibilities that relate to an occupational category other than the occupational category to which the duties performed by and responsibilities entrusted to the other employees in that unit relate.

Composition of bargaining unit

(4) For the purposes of this Act, a unit of employees may be determined by the Board to constitute a unit appropriate for collective bargaining whether or not its composition is identical with the group of employees in respect of which application for certification was made. 1966-67, c. 72, s. 32.

Determination of membership in bargaining units

33. Where, at any time following the determination by the Board of a group of employees to constitute a unit appropriate for collective bargaining, any question arises as to whether any employee or class of employees is or is not included therein or is included in any other unit, the Board shall, on application by the employer or any employee organization affected, determine the question. 1966-67, c. 72, s. 33.

Certification

Certification of employee organization as bargaining unit

34. Where the Board

(*a*) has received from an employee organization an application for certification as bargaining agent for a bargaining unit in accordance with this Act,

(*b*) has determined the group of employees that constitutes a unit appropriate for collective bargaining in accordance with section 32,

(*c*) is satisfied that a majority of employees in the bargaining unit wish the employee organization to represent them as their bargaining agent, and

(*d*) is satisfied that the persons representing the employee organization in the making of the application have been duly authorized to make the application,

the Board shall, subject to this Act, certify the employee organization making the application as bargaining agent for the employees in that bargaining unit. 1966-67, c. 72, s. 34.

Powers of Board in relation to certification

35. (1) For the purpose of enabling the Board to discharge any obligation imposed by section 34 to satisfy itself as to the matters

la demande antérieure n'a été rejetée qu'à cause d'une erreur ou omission de procédure faite relativement à cette demande. 1966-67, c. 72, art. 31.

Détermination des unités de négociation habiles à négocier

Détermination d'une unité

32. (1) Lorsqu'une association d'employés a demandé à la Commission de l'accréditer comme l'indique l'article 27, la Commission doit, sous réserve du paragraphe 26(4), déterminer quel est le groupe d'employés qui constitue une unité habile à négocier collectivement.

Facteurs dont la Commission doit tenir compte

(2) Lorsqu'elle détermine si un groupe d'employés constitue une unité habile à négocier collectivement, la Commission doit tenir compte, eu égard à la bonne application de la présente loi, des fonctions et de la classification des employés de l'unité de négociation proposée par rapport à tout mode de classification pour autant qu'il s'applique aux employés de l'unité de négociation proposée.

Les fonctions des employés de l'unité de négociation doivent être analogues

(3) Ne peut faire partie d'une unité de négociation aucun employé qui remplit des fonctions ou assume des responsabilités rattachées à une catégorie d'occupations autre que celle à laquelle se rattachent les fonctions et responsabilités des autres employés de cette unité.

Composition d'une unité de négociation

(4) Aux fins de la présente loi, une unité d'employés peut être déterminée par la Commission comme constituant une unité habile à négocier collectivement, que sa composition soit ou non identique au groupe d'employés relativement auquel a été faite la demande d'accréditation. 1966-67, c. 72, art. 32.

Détermination de l'affiliation aux unités de négociation

33. Lorsque, à un moment quelconque après que la Commission a décidé qu'un groupe d'employés constitue une unité habile à négocier collectivement, se pose la question de savoir si un employé ou une classe d'employés en fait ou n'en fait pas partie ou fait partie d'une autre unité, la Commission doit, sur demande de l'employeur ou de toute association d'employés concernée, trancher la question. 1966-67, c. 72, art. 33.

Accréditation

Accréditation d'une association d'employés à titre d'unité de négociation

34. Lorsque la Commission

a) a reçu d'une association d'employés une demande d'accréditation à titre d'agent négociateur d'une unité de négociation conformément à la présente loi,

b) a déterminé quel est le groupe d'employés qui constitue une unité de négociation habile à négocier collectivement, en conformité de l'article 32,

c) est convaincue que la majorité des employés de l'unité de négociation désire que l'association d'employés les représente à titre d'agent négociateur, et

d) est convaincue que les personnes représentant l'association d'employés dans la demande ont été dûment autorisées à faire la demande,

la Commission doit, sous réserve de la présente loi, accréditer l'association d'employés faisant la demande à titre d'agent négociateur pour les employés de cette unité de négociation. 1966-67, c. 72, art. 34.

Pouvoirs de la Commission en matière d'accréditation

35. (1) Afin de pouvoir s'acquitter de toute obligation que lui impose l'article 34 relativement à la conviction qu'elle doit acquérir au

described in paragraphs (*c*) and (*d*) of that section, the Board may

(*a*) examine, in accordance with any regulations that may be made by the Board in that behalf, such evidence as is submitted to it respecting membership of the employees in the proposed bargaining unit in the employee organization seeking certification;

(*b*) make or cause to be made such examination of records or make such inquiries as it deems necessary; and

(*c*) examine documents forming or relating to the constitution or articles of association of the employee organization seeking certification,

and, in its sole discretion, the Board may in any case for the purpose of satisfying itself that a majority of employees in the bargaining unit wish the employee organization to represent them as their bargaining agent, direct that a representation vote be taken among the employees in the bargaining unit.

Where representation vote to be taken

(2) Where under subsection (1) the Board directs that a representation vote be taken, the Board shall

(*a*) determine the employees that are eligible to vote; and

(*b*) make such arrangements and give such directions as to it appear requisite for the proper conduct of the representation vote including the preparation of ballots, the method of casting and counting ballots and the custody and sealing of ballot boxes. 1966-67, c. 72, s. 35.

Specification of process for resolution of disputes

36. (1) Subject to subsection 37(2), every bargaining agent for a bargaining unit shall, in such manner as may be prescribed, specify which of either of the processes described in the definition "process for resolution of a dispute" in section 2 shall be the process for resolution of any dispute to which it may be a party in respect of that bargaining unit.

Employer to furnish statement

(2) For the purpose of facilitating the specification by a bargaining agent of the process for resolution of any dispute to which it may be a party in respect of a bargaining unit, the Board shall, upon request in writing to it by the bargaining agent, by notice require the employer to furnish to the Board and the bargaining agent a statement in writing of the employees or classes of employees in the bargaining unit whom the employer then considers to be designated employees within the meaning of section 79, and the employer shall, within fourteen days after the receipt of such notice, furnish such statement to the Board and the bargaining agent. 1966-67, c. 72, s. 36.

Process for resolution of disputes to be recorded

37. (1) Where a bargaining agent for a bargaining unit has specified the process for resolution of a dispute as provided in subsection 36(1), the Board shall record, as part of the certification of the bargaining agent for that bargaining unit, the process so specified.

Period during which process to apply

(2) The process for resolution of a dispute specified by a bargaining agent as provided in subsection 36(1) and recorded by the Board under subsection (1) of this section shall be the process applicable to that bargaining unit for the resolution of all disputes from the day on

sujet des questions visées par les alinéas *c*) et *d*) de cet article, la Commission peut

a) examiner, en conformité de tout règlement que la Commission peut établir à ce propos, les preuves qui lui sont fournies au sujet de l'affiliation des employés de l'unité de négociation proposée à l'association d'employés qui demande l'accréditation;

b) faire ou faire faire l'examen de dossiers ou faire les enquêtes qu'elle estime nécessaires, et

c) examiner les documents qui forment la constitution ou les statuts de l'association d'employés demandant l'accréditation, ou qui s'y rapportent,

et, à sa seule discrétion, la Commission peut en toutes circonstances, pour s'assurer que la majorité des employés de l'unité de négociation désire que l'association d'employés les représente à titre d'agent négociateur, ordonner que soit tenu un scrutin de représentation parmi les employés de l'unité de négociation.

(2) Lorsque, aux termes du paragraphe (1), la Commission ordonne que soit tenu un scrutin de représentation, elle doit

Cas où il doit y avoir un vote de représentation

a) décider quels sont les employés qui ont le droit d'y participer; et

b) prendre les dispositions et donner les instructions qui lui semblent nécessaires à la tenue régulière du scrutin de représentation, notamment en ce qui concerne la préparation des bulletins de vote, la manière de voter, le dépouillement du scrutin, la garde et le scellage des urnes de scrutin. 1966-67, c. 72, art. 35.

36. (1) Sous réserve du paragraphe 37(2), tout agent négociateur pour une unité de négociation doit, de la manière qui peut être prescrite, spécifier laquelle des deux méthodes de règlement décrites à la définition de «méthode de règlement des différends» dans l'article 2 il faut suivre pour régler tout différend auquel il peut être partie relativement à cette unité de négociation.

Spécification de la méthode de règlement des différends

(2) Pour faciliter à un agent négociateur le choix de la méthode à suivre pour régler tout différend auquel il peut être partie relativement à une unité de négociation, la Commission, sur demande écrite que lui présente l'agent négociateur, doit sommer par avis l'employeur de communiquer à la Commission et à l'agent négociateur une liste écrite des employés ou catégories d'employés de l'unité de négociation que l'employeur considère alors comme employés désignés, au sens de l'article 79. L'employeur doit, dans les quinze jours qui suivent la réception de cet avis, communiquer cette liste à la Commission et à l'agent négociateur. 1966-67, c. 72, art. 36.

L'employeur doit communiquer une liste

37. (1) Lorsqu'un agent négociateur pour une unité de négociation a spécifié la méthode de règlement d'un différend ainsi que le prévoit le paragraphe 36(1), la Commission doit consigner, en l'intégrant à l'accréditation de l'agent négociateur pour cette unité de négociation, la méthode ainsi spécifiée.

La méthode de règlement des différends doit être consignée

(2) La méthode de règlement d'un différend spécifiée par un agent négociateur ainsi que le prévoit le paragraphe 36(1) et consignée par la Commission aux termes du paragraphe (1) du présent article doit être la méthode applicable à cette unité de négociation pour le règlement de

Durée d'application de la méthode

which any notice to bargain collectively in respect of that bargaining unit is given next following the specification of the process, and thereafter until the process is altered in accordance with section 38. 1966-67, c. 72, s. 37.

Application for alteration of process

38. (1) A bargaining agent for a bargaining unit may, in such manner and circumstances as may be prescribed, apply to the Board to record an alteration in the process for resolution of a dispute that is applicable to the bargaining unit in respect of which it is certified.

Alteration to be recorded

(2) The Board shall record an alteration in the process for resolution of a dispute made pursuant to an application under subsection (1) in the same manner as is provided in subsection 37(1) in relation to the initial specification of the process for resolution of a dispute.

Effective date and duration

(3) An alteration in the process for resolution of a dispute applicable to a bargaining unit becomes effective on the day that any notice to bargain collectively is given next following the alteration and remains in effect until the process for resolution of a dispute is again altered pursuant to subsection (2). 1966-67, c. 72, s. 38.

Where Certification Prohibited

Where participation by employer in formation of employee organization

39. (1) The Board shall not certify as bargaining agent for a bargaining unit, any employee organization in the formation or administration of which there has been or is, in the opinion of the Board, participation by the employer or any person acting on behalf of the employer of such a nature as to impair its fitness to represent the interests of employees in the bargaining unit.

Where money received or paid for activities by political party

(2) The Board shall not certify as bargaining agent for a bargaining unit, any employee organization that

(*a*) receives from any of its members who are employees,

(*b*) handles or pays in its own name on behalf of members who are employees, or

(*c*) requires as a condition of membership therein the payment by any of its members of,

any money for activities carried on by or on behalf of any political party.

Where discrimination by reason of race, etc.

(3) The Board shall not certify as bargaining agent for a bargaining unit, any employee organization that discriminates against any employee because of sex, race, national origin, colour or religion. 1966-67, c. 72, s. 39.

Effect of Certification

Effect of certification

40. (1) Where an employee organization is certified under this Act as the bargaining agent for a bargaining unit,

(*a*) the employee organization has the exclusive right under this Act

(i) to bargain collectively on behalf of employees in the bargaining unit and to bind them by a collective agreement until

tous les différends à compter du jour où un avis de négocier collectivement pour cette unité de négociation est donné pour la première fois après que la méthode a été spécifiée, et par la suite jusqu'à ce que la méthode soit changée conformément à l'article 38. 1966-67, c. 72, art. 37.

Demande de changement de la méthode à suivre

38. (1) L'agent négociateur d'une unité de négociation peut, de la manière et dans les conditions qui peuvent être prescrites, demander à la Commission de consigner un changement de méthode de règlement d'un différend applicable à l'unité de négociation relativement à laquelle il est accrédité.

Le changement doit être inscrit

(2) La Commission doit consigner tout changement de la méthode de règlement d'un différend, établi conformément à une demande faite selon le paragraphe (1), de la manière que prévoit le paragraphe 37(1) relativement à la spécification initiale de la méthode de règlement d'un différend.

Date d'application et durée

(3) Un changement de la méthode de règlement d'un différend, applicable à une unité de négociation, prend effet à la date où un avis de négocier collectivement est donné pour la première fois après le changement. Il reste en vigueur jusqu'à ce que la méthode de règlement d'un différend soit de nouveau changée en conformité du paragraphe (2). 1966-67, c. 72, art. 38.

Interdiction d'accréditer

Participation de l'employeur à la formation de l'association d'employés

39. (1) La Commission ne doit pas accréditer à titre d'agent négociateur pour une unité de négociation, une association d'employés, si elle estime que l'employeur (ou une personne agissant en son nom) a participé ou participe à la formation ou à l'administration de cette unité de manière à en compromettre la capacité à représenter les intérêts des employés de ladite unité de négociation.

Cas où l'on perçoit ou verse de l'argent au profit d'activité d'un parti politique

(2) La Commission ne doit accréditer à titre d'agent négociateur d'une unité de négociation aucune association d'employés qui

a) reçoit de certains de ses membres qui sont des employés,

b) a en main ou paie en son propre nom pour le compte de membres qui sont des employés, ou

c) exige de certains de ses membres, comme condition de leur affiliation à l'association, qu'ils lui versent

de l'argent pour l'activité poursuivie par un parti politique ou pour le compte d'un tel parti.

Discrimination raciale ou autre

(3) La Commission ne doit accréditer, à titre d'agent négociateur d'une unité de négociation, aucune association d'employés qui fait des distinctions injustes à l'égard d'un employé quelconque en raison du sexe, de la race, de l'origine nationale, de la couleur ou de la religion. 1966-67, c. 72, art. 39.

Effet de l'accréditation

Effet de l'accréditation

40. (1) Lorsqu'une association d'employés est accréditée aux termes de la présente loi à titre d'agent négociateur d'une unité de négociation,

a) l'association d'employés a, en vertu de la présente loi, le droit exclusif

(i) de négocier collectivement pour le compte des employés de l'unité de négociaits certification in respect of the bargaining unit is revoked, and

(ii) to represent, in accordance with this Act, an employee in the presentation or reference to adjudication of a grievance relating to the interpretation or application of a collective agreement or arbitral award applying to the bargaining unit to which the employee belongs;

(*b*) if another employee organization had been previously certified as bargaining agent in respect of employees in the bargaining unit, the certification of the previously certified bargaining agent is thereupon revoked in respect of such employees; and

(*c*) if, at the time of certification, a collective agreement or arbitral award binding on the employees in the bargaining unit is in force, the employee organization shall be substituted as a party to the agreement or award in place of the bargaining agent that had been a party thereto and may, notwithstanding anything contained in the agreement or award, terminate the agreement or award, in so far as it applies to the employees in the bargaining unit, upon two months notice to the employer given within one month from such certification.

Rights of previous or new bargaining agent

(2) In any case where paragraph (1)(*b*) or (*c*) applies, any question as to any right or duty of the previous bargaining agent or the new bargaining agent arising by reason of the application of that paragraph shall, on application by the employer or the previous or the new bargaining agent, be determined by the Board. 1966-67, c. 72, s. 40.

Revocation of Certification

On Application

Application for declaration that employee organization no longer represents employees

41. (1) Where a collective agreement or an arbitral award is in force in respect of a bargaining unit, any person claiming to represent a majority of the employees in that bargaining unit may, in accordance with subsection (2), apply to the Board for a declaration that the employee organization certified as bargaining agent for that bargaining unit no longer represents a majority of the employees therein.

When application may be made

(2) An application under subsection (1) may be made

(*a*) where the collective agreement or arbitral award is for a term of not more than two years, only after the commencement of the last two months of its operation;

(*b*) where the collective agreement or arbitral award is for a term of more than two years, only after the commencement of the twenty-third month of its operation and before the commencement of the twenty-fifth month of its operation, during the two-month period immediately preceding the end of each year that it continues to operate after the second year of its operation, or after the commencement of the last two months of its operation, as the case may be; and

(*c*) where the collective agreement provides that it will continue to operate after the term specified therein for a further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or

tion et de les lier par une convention collective jusqu'à l'annulation de son accréditation pour l'unité de négociation, et

(ii) de représenter un employé, en conformité de la présente loi, à l'occasion de la présentation ou du renvoi à un arbitre d'un grief relatif à l'interprétation ou à l'application d'une convention collective ou d'une décision arbitrale s'appliquant à l'unité de négociation dont fait partie l'employé;

b) si une autre association d'employés avait antérieurement été accréditée à titre d'agent négociateur pour des employés de l'unité de négociation, l'accréditation de l'agent négociateur précédemment accrédité est alors annulée à l'égard de ces employés; et

c) si, à la date de l'accréditation, une convention collective ou une décision arbitrale liant les employés de l'unité de négociation est en vigueur, l'association d'employés doit prendre la place, comme partie à la convention ou à la décision arbitrale, de l'agent négociateur qui y était jusque-là partie et peut, nonobstant toute stipulation de ladite convention ou décision, mettre fin à cette convention ou décision, dans la mesure où elle s'applique aux employés de l'unité de négociation, sur préavis de deux mois donné à l'employeur dans un délai d'un mois à compter de l'accréditation.

Droits de l'ancien ou du nouvel agent négociateur

(2) Dans tous les cas où s'appliquent les alinéas (1)*b*) ou *c*) la Commission doit trancher toute question relative à un droit ou à un devoir de l'ancien ou du nouvel agent négociateur suivant de l'application de l'un de ces alinéas sur demande de l'employeur ou sur demande de l'ancien ou du nouvel agent négociateur. 1966-67, c. 72, art. 40.

Annulation de l'accréditation

Annulation sur demande

Demande de déclaration portant qu'une association d'employés ne représente plus les employés

41. (1) Lorsqu'une convention collective ou une décision arbitrale est en vigueur relativement à une unité de négociation, toute personne faisant valoir qu'elle représente la majorité des employés de cette unité de négociation peut, conformément au paragraphe (2), demander à la Commission de déclarer que l'association d'employés accréditée à titre d'agent négociateur de cette unité de négociation ne représente plus la majorité des employés de celle-ci.

Moments où la demande peut être faite

(2) Une demande prévue au paragraphe (1) peut être faite,

a) si la convention collective ou la décision arbitrale a une durée d'au plus deux ans, seulement après le début de l'avant-dernier mois de son application;

b) si la convention collective ou la décision arbitrale a une durée de plus de deux ans, seulement après le début du vingt-troisième mois de son application et avant le début du vingt-cinquième mois de son application, pendant la période de deux mois qui précède immédiatement la fin de chaque année de son application au-delà de la seconde année ou après le début de l'avant-dernier mois de son application, selon le cas; et

c) si la convention collective dispose qu'elle continuera d'être appliquée après l'expiration du terme y spécifié, pendant un autre terme ou plusieurs termes consécutifs, dans l'hypothèse où aucune des parties ne donne à l'autre un avis de dénonciation ou de son désir de négocier soit le renouvellement, avec ou sans modifications, de la convention, soit l'établis-

with a view to the making of a new collective agreement, at any time permitted by paragraph (*a*) or (*b*), as the case may be, or during the two-month period immediately preceding the end of each year that the agreement continues to operate after the term specified therein.

Taking of representation vote (3) Upon an application under subsection (1), the Board in its sole discretion may direct the taking of a representation vote in order to determine whether a majority of the employees in the bargaining unit no longer wish to be represented by the employee organization that is the bargaining agent for that bargaining unit, and in relation to the taking of any such vote the provisions of subsection 35(2) apply.

Revocation of certification of employee organization (4) After hearing any application under subsection (1), the Board shall revoke the certification of an employee organization as bargaining agent for a bargaining unit if it is satisfied that a majority of the employees in that bargaining unit no longer wish to be represented by the employee organization. 1966-67, c. 72, s. 41.

For Abandonment or Other Cause

Abandonment of certification **42.** (1) The Board shall revoke the certification of a bargaining agent where the bargaining agent advises the Board that it wishes to give up or abandon its certification or where the Board, upon application by the employer or any employee, determines that the bargaining agent has ceased to act as such.

Revocation where certification prohibited under s. 39 (2) Where the Board, upon application to it by the employer or any employee, determines that a bargaining agent would not, if it were an employee organization applying for certification, be certified by the Board by reason of a prohibition contained in section 39, the Board shall revoke the certification of the bargaining agent. 1966-67, c. 72, s. 42.

For Fraud

Certification obtained by fraud **43.** (1) Where at any time the Board is satisfied that an employee organization has obtained certification as bargaining agent for a bargaining unit by fraud, the Board shall revoke the certification of such employee organization.

Effect of revocation (2) An employee organization the certification of which is revoked pursuant to subsection (1) is not entitled to claim any right or privilege flowing from such certification, and any collective agreement or arbitral award applying to the bargaining unit for which it was certified, to which such employee organization was a party, is void. 1966-67, c. 72, s. 43.

Revocation of Certification of Council

Revocation of certification of council **44.** In addition to the circumstances in which, pursuant to section 41, 42 or 43, the certification of a bargaining agent may be revoked, where an employee organization that is a council of employee organizations has been certified as bargaining agent for a bargaining unit, the Board, on application to it by the employer or an employee organization that forms or has formed part of the council, shall revoke the certification of the council where it determines that, by reason of

ment d'une nouvelle convention collective, à tout moment permis par l'alinéa *a*) ou l'alinéa *b*), selon le cas, ou pendant la période de deux mois précédant immédiatement la fin de chacune des années d'application de la convention qui sont postérieures au terme y spécifié.

Tenue d'un vote de représentation (3) Sur demande prévue par le paragraphe (1), la Commission peut, à sa discrétion, ordonner la tenue d'un scrutin de représentation afin de déterminer si la majorité des employés de l'unité de négociation ne désire plus être représentée par l'association d'employés qui en est l'agent négociateur. Le paragraphe 35(2) s'applique à ce scrutin.

Annulation de l'accréditation d'une association d'employés (4) Après l'audition d'une demande prévue par le paragraphe (1), la Commission doit annuler l'accréditation d'une association d'employés à titre d'agent négociateur d'une unité de négociation si elle est convaincue que la majorité des employés de cette unité de négociation ne désire plus être représentée par l'association d'employés. 1966-67, c. 72, art. 41.

Annulation pour renonciation ou autre raison

Renonciation à l'accréditation **42.** (1) La Commission doit annuler l'accréditation d'un agent négociateur lorsque ce dernier l'avise qu'il désire renoncer à son accréditation ou que la Commission, sur demande de l'employeur ou d'un employé, décide que l'agent négociateur a cessé d'agir à ce titre.

Annulation lorsque l'accréditation est interdite aux termes de l'art. 39 (2) Lorsque la Commission, sur demande à elle faite par l'employeur ou un employé, décide qu'un agent négociateur ne serait pas, s'il s'agissait d'une association d'employés demandant l'accréditation, accrédité par elle en raison d'une interdiction prévue à l'article 39, elle doit annuler l'accréditation de l'agent négociateur. 1966-67, c. 72, art. 42.

Annulation pour fraude

Accréditation obtenue par fraude **43.** (1) La Commission doit, si elle est convaincue qu'une association d'employés a obtenu frauduleusement son accréditation d'agent négociateur d'une unité de négociation, annuler l'accréditation de cette association d'employés.

Effet de l'annulation (2) Une association d'employés dont l'accréditation est annulée en conformité du paragraphe (1) n'est pas admise à faire valoir quelque droit ou privilège découlant de cette accréditation. Toute convention collective ou décision arbitrale à laquelle l'association d'employés a été partie et qui s'applique à l'unité de négociation pour laquelle l'association d'employés était accréditée est nulle. 1966-67, c. 72, art. 43.

Annulation de l'accréditation d'un conseil

Annulation de l'accréditation d'un conseil **44.** Outre les circonstances dans lesquelles, conformément aux articles 41, 42 ou 43, l'accréditation d'un agent négociateur peut être annulée, lorsqu'une association d'employés qui est un conseil d'associations d'employés a été accréditée à titre d'agent négociateur d'une unité de négociation, la Commission, sur demande à elle faite par l'employeur ou une association d'employés qui fait ou a fait partie du conseil, doit annuler l'accréditation du conseil lorsqu'elle décide que, par suite (*a*) an alteration in the constituent membership of the council, or

(*b*) any other circumstances,

the council no longer meets the additional requirements for certification required for a council of employee organizations by subsection 20(2). 1966-67, c. 72, s. 44.

Effect of Revocation: Rights of Employee Organizations and Employees

Effect of revocation

45. Where, at the time the certification of a bargaining agent for a bargaining unit is revoked, a collective agreement or arbitral award binding on the employees in that bargaining unit is in force, except where another employee organization is substituted as a party to the agreement or award upon the revocation of such certification, the agreement or award shall thereupon cease to be in effect. 1966-67, c. 72, s. 45.

Determination of rights of bargaining agent

46. Where the certification of a bargaining agent for a bargaining unit is revoked by the Board pursuant to section 41, 42 or 44, any question as to any right or duty of that bargaining agent or of any new bargaining agent replacing it shall, on application by either organization, be determined by the Board. 1966-67, c. 72, s. 46.

Directions

47. Where the certification of a bargaining agent for a bargaining unit is revoked by the Board pursuant to section 41, 42, 43 or 44 and as a result thereof a collective agreement or arbitral award binding on the employees in the bargaining unit ceases to be in effect or a collective agreement or arbitral award applying to the bargaining unit is void, the Board shall, on application to it by or on behalf of any employee and in accordance with any regulations made by it in respect thereof, direct the manner in which any right acquired by, or determined by the Board to have accrued to, an employee that is affected by the revocation is to be recognized and given effect to. 1966-67, c. 72, s. 47.

Successor Rights

Mergers, amalgamations and transfers of jurisdiction

48. Where, upon a merger or amalgamation of employee organizations or a transfer of jurisdiction among employee organizations otherwise than as a result of revocation of certification, any question arises concerning the rights, privileges and duties of an employee organization under this Act or under a collective agreement or arbitral award in respect of a bargaining unit or an employee therein, the Board, on application to it by any employee organization affected, shall examine the question and may, in accordance with any regulations made by it in respect thereof, declare or determine what rights, privileges and duties if any have been acquired or are retained, as the case may be, by that employee organization. 1966-67, c. 72, s. 48.

Negotiation of Collective Agreements

Notice to Bargain Collectively

Notice to bargain collectively

49. (1) Where the Board has certified an employee organization as bargaining agent for a bargaining unit and the process for resolution of a dispute applicable to that bargaining unit has been specified as provided in subsection 36(1),

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a) d'une modification de la composition du conseil, ou

b) de toute autre circonstance,

le conseil ne remplit plus les conditions supplémentaires d'accréditation exigées pour un conseil d'associations d'employés aux termes du paragraphe 20(2). 1966-67, c. 72, art. 44.

Effet de l'annulation: Droits des associations d'employés et des employés

Effet de l'annulation

45. Lorsque, à la date où est annulée l'accréditation d'un agent négociateur d'une unité de négociation, une convention collective ou une décision arbitrale liant les employés de cette unité de négociation est en vigueur, l'annulation de cette accréditation fait immédiatement cesser l'application de la convention ou de la décision arbitrale, sauf si une autre association d'employés est alors substituée comme partie à la convention ou à la décision arbitrale. 1966-67, c. 72, art. 45.

Détermination des droits de l'agent négociateur

46. Lorsque la Commission annule l'accréditation d'un agent négociateur d'une unité de négociation en conformité des articles 41, 42 ou 44, elle doit trancher toute question relative à un droit ou à un devoir de cet agent négociateur ou d'un nouvel agent négociateur qui le remplace sur demande de l'une ou l'autre des associations. 1966-67, c. 72, art. 46.

Instructions

47. Lorsque la Commission annule l'accréditation d'un agent négociateur d'une unité de négociation en conformité des articles 41, 42, 43 ou 44, et qu'en conséquence une convention collective ou une décision arbitrale liant les employés de l'unité de négociation cesse de s'appliquer ou qu'une convention collective ou décision arbitrale s'appliquant à l'unité de négociation est nulle, la Commission doit, sur demande à elle faite par ou pour un employé conformément aux règlements établis par elle à ce sujet, donner des instructions sur la manière dont tout droit acquis par un employé visé par l'annulation, ou que la Commission déclare acquis par un tel employé, doit être reconnu et appliqué. 1966-67, c. 72, art. 47.

Droits du successeur

Fusions et transferts de compétence

48. Si, lors d'une fusion d'associations d'employés ou d'un transfert de juridiction parmi des associations d'employés résultant d'autre chose que d'une annulation d'accréditation, se pose une question relative aux droits, privilèges et devoirs d'une association d'employés, aux termes de la présente loi ou d'une convention collective ou décision arbitrale, relativement à une unité de négociation ou à un employé qui en fait partie, la Commission, sur demande à elle faite par toute association d'employés visée, doit étudier la question. Elle peut, conformément aux règlements établis par elle à ce sujet, déclarer ou décider quels sont, le cas échéant, les droits, privilèges et devoirs qui ont été acquis ou qui sont conservés, selon le cas, par cette association d'employés. 1966-67, c. 72, art. 48.

Négociation des conventions collectives

Avis de négocier collectivement

Avis de négocier collectivement

49. (1) Lorsque la Commission a accrédité une association d'employés comme agent négociateur d'une unité de négociation et que la méthode de règlement d'un différend applicable à cette unité de négociation a été spécifiée comme le prévoit le paragraphe 36(1),

(*a*) the bargaining agent may, on behalf of the employees in the bargaining unit, by notice in writing require the employer to commence bargaining collectively, or

(*b*) the employer may by notice in writing require the bargaining agent to commence bargaining collectively,

with a view to the conclusion, renewal or revision of a collective agreement.

When notice may be given

(2) Notice to bargain collectively may be given

(*a*) where no collective agreement or arbitral award is in force and no request for arbitration has been made by either of the parties in accordance with this Act, at any time; and

(*b*) where a collective agreement or arbitral award is in force, within the period of two months before the agreement or award ceases to operate. 1966-67, c. 72, s. 49.

Where Notice Given

Commencement of collective bargaining

50. Where notice to bargain collectively has been given, the bargaining agent and the officers designated to represent the employer shall, without delay, but in any case within twenty days after the notice was given or within such further time as the parties may agree, meet and commence to bargain collectively in good faith and make every reasonable effort to conclude a collective agreement. 1966-67, c. 72, s. 50.

Continuation in force of terms and conditions

51. Where notice to bargain collectively has been given, any term or condition of employment applicable to the employees in the bargaining unit in respect of which the notice was given that may be embodied in a collective agreement and that was in force on the day the notice was given, shall remain in force and shall be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit, except as otherwise provided by any agreement in that behalf that may be entered into by the employer and the bargaining agent, until such time as

(*a*) in the case of a bargaining unit for which the process for resolution of a dispute is by the referral thereof to arbitration,

(i) a collective agreement has been entered into by the parties and no request for arbitration in respect of that term or condition of employment, or in respect of any term or condition of employment proposed to be substituted therefor, has been made in the manner and within the time prescribed therefor by this Act, or

(ii) a request for arbitration in respect of that term or condition of employment, or in respect of any term or condition of employment proposed to be substituted therefor, has been made in accordance with this Act and a collective agreement has been entered into or an arbitral award has been rendered in respect thereof; and

(*b*) in the case of a bargaining unit for which the process for resolution of a dispute is by the referral thereof to a conciliation board,

(i) a collective agreement has been entered into by the parties,

(ii) a conciliation board has been established in accordance with this Act and seven days have elapsed from the receipt

a) l'agent négociateur peut, pour le compte des employés de l'unité de négociation, par avis écrit, requérir l'employeur d'entamer des négociations collectives; ou

b) l'employeur peut, par avis écrit, requérir l'agent négociateur d'entamer des négociations collectives,

en vue de la conclusion, du renouvellement ou de la revision d'une convention collective.

Quand l'avis peut être donné

(2) Avis de négocier collectivement peut être donné,

a) si aucune convention collective ou décision arbitrale n'est en vigueur et si ni l'une ni l'autre des parties n'a formulé de demande d'arbitrage en conformité de la présente loi, à quelque moment que ce soit; et

b) si une convention collective ou une décision arbitrale est en vigueur, dans la période de deux mois précédant la date où la convention ou la décision cesse de s'appliquer. 1966-67, c. 72, art. 49.

Notification de l'avis

Début des négociations collectives

50. Si un avis de négocier collectivement a été donné, l'agent négociateur et les fonctionnaires désignés pour représenter l'employeur doivent, sans retard et en tout cas dans les vingt jours qui suivent celui où l'avis a été donné ou dans tel délai supplémentaire dont peuvent convenir les parties, se rencontrer, entamer de bonne foi des négociations collectives et s'efforcer, dans la mesure du possible, de conclure une convention collective. 1966-67, c. 72, art. 50.

Maintien en vigueur des conditions

51. Si un avis de négocier collectivement a été donné, toute condition d'emploi applicable aux employés de l'unité de négociation pour laquelle l'avis a été donné, qui peut être incluse dans une convention collective et qui était en vigueur le jour où l'avis a été donné, doit rester en vigueur et être observée par l'employeur, l'agent négociateur de l'unité de négociation et les employés de celle-ci, à moins qu'il n'en soit autrement disposé par une convention à ce sujet que peuvent conclure l'employeur et l'agent négociateur,

a) dans le cas d'une unité de négociation pour laquelle la méthode de règlement d'un différend est le renvoi à l'arbitrage,

(i) jusqu'à ce qu'une convention collective ait été conclue par les parties et tant qu'une demande d'arbitrage relative à cette condition d'emploi ou à une autre condition d'emploi proposée à sa place n'a pas été faite de la manière et dans le délai prescrits à cette fin par la présente loi, ou

(ii) jusqu'à ce qu'une demande d'arbitrage relative à cette condition d'emploi ou à une autre condition d'emploi proposée à sa place ait été faite en conformité de la présente loi et qu'une convention collective ait été conclue ou qu'une décision arbitrale ait été rendue à ce sujet; et

b) dans le cas d'une unité de négociation pour laquelle la méthode de règlement d'un différend est le renvoi à un bureau de conciliation,

(i) jusqu'à ce qu'une convention collective ait été conclue par les parties,

(ii) jusqu'à ce qu'un bureau de conciliation ait été établi en conformité de la présente loi et que sept jours se soient écoulés depuis la réception, par le Président, du rapport du bureau de conciliation, ou by the Chairman of the report of the conciliation board, or

(iii) a request for the establishment of a conciliation board has been made in accordance with this Act and the Chairman has notified the parties pursuant to section 78 of his intention not to establish such a board. 1966-67, c. 72, s. 51.

Conciliation

Request for conciliation

52. Where the employer or a bargaining agent advises the Board by notice in writing of the inability of the parties to reach agreement on any term or condition of employment that may be embodied in a collective agreement and that it desires the assistance of a conciliator in reaching agreement, the Chairman may appoint a conciliator who shall, forthwith after his appointment, confer with the parties and endeavour to assist them in reaching agreement. 1966-67, c. 72, s. 52.

Report of conciliator

53. A conciliator shall, within fourteen days from the date of his appointment or within such longer period as the Chairman may determine, report his success or failure to the Chairman. 1966-67, c. 72, s. 53.

Collective Agreements

Authority to enter into Agreement

Authority of Treasury Board

54. The Treasury Board may, in such manner as may be provided for by any rules or procedures determined by it pursuant to section 3 of the *Financial Administration Act*, enter into a collective agreement with the bargaining agent for a bargaining unit, other than a bargaining unit comprised of employees of a separate employer, applicable to employees in that bargaining unit. 1966-67, c. 72, s. 54.

Authority of separate employer

55. A separate employer may, with the approval of the Governor in Council, enter into a collective agreement with the bargaining agent for a bargaining unit comprised of employees of the separate employer, applicable to employees in that bargaining unit. 1966-67, c. 72, s. 55.

Provisions of Collective Agreement

Time within which agreement to be implemented

56. (1) The provisions of a collective agreement shall, subject to the appropriation by or under the authority of Parliament of any moneys that may be required by the employer therefor, be implemented by the parties,

(*a*) where a period within which the collective agreement is to be implemented is specified in the collective agreement, within that period; and

(*b*) where no period for implementation is so specified

(i) within a period of ninety days from the date of its execution, or

(ii) within such longer period as may, on application by either party to the agreement, appear reasonable to the Board.

Terms or conditions requiring legislative implementation

(2) No collective agreement shall provide, directly or indirectly, for the alteration or elimination of any existing term or condition of employment or the establishment of any new term or condition of employment,

(iii) jusqu'à ce qu'une demande d'établissement d'un bureau de conciliation ait été faite en conformité de la présente loi et que le Président ait avisé les parties, conformément à l'article 78, de son intention de ne pas établir un tel bureau. 1966-67, c. 72, art. 51.

Conciliation

Demande de conciliation

52. Lorsque l'employeur ou un agent négociateur avise par écrit la Commission que les parties n'arrivent pas à se mettre d'accord sur une condition d'emploi pouvant être incluse dans une convention collective et qu'il désire se faire aider d'un conciliateur pour parvenir à un accord, le Président peut nommer un conciliateur. Celui-ci doit, dès sa nomination, conférer avec les parties et s'efforcer de les aider à se mettre d'accord. 1966-67, c. 72, art. 52.

Rapport du conciliateur

53. Un conciliateur doit, dans un délai de quatorze jours à compter de la date de sa nomination ou dans le délai plus long que peut fixer le Président, faire rapport au Président de son succès ou de son échec. 1966-67, c. 72, art. 53.

Conventions collectives

Pouvoir de conclure des conventions

Pouvoir du conseil du Trésor

54. Le conseil du Trésor peut, de la manière qui peut être prévue par les règles ou les procédures qu'il détermine conformément à l'article 3 de la *Loi sur l'administration financière*, conclure avec l'agent négociateur d'une unité de négociation, autre qu'une unité de négociation composée d'employés d'un employeur distinct, une convention collective applicable aux employés de cette unité de négociation. 1966-67, c. 72, art. 54.

Pouvoir d'un employeur distinct

55. Un employeur distinct peut, avec l'approbation du gouverneur en conseil, conclure avec l'agent négociateur d'une unité de négociation composée d'employés de cet employeur distinct une convention collective applicable aux employés de cette unité de négociation. 1966-67, c. 72, art. 55.

Dispositions d'une convention collective

Délai pour mettre en œuvre une convention

56. (1) Les dispositions d'une convention collective doivent, sous réserve de l'affectation par le Parlement ou sous son autorité des crédits dont l'employeur peut avoir besoin à cette fin, être mises en œuvre par les parties,

a) lorsque la convention collective spécifie un délai pour la mise en œuvre de la convention collective, au cours de ce délai; et

b) lorsque aucun délai de mise en œuvre n'est ainsi spécifié,

(i) dans les quatre-vingt-dix jours de la date de sa signature, ou

(ii) dans tel autre délai plus long que la Commission peut, à la requête de l'une ou l'autre des parties à la convention, estimer raisonnable.

Conditions nécessitant une mesure législative

(2) Aucune convention collective ne doit prévoir, directement ou indirectement, la modification ou la suppression d'une condition d'emploi existante ni l'établissement d'une nouvelle condition d'emploi

(*a*) the alteration or elimination of which or the establishment of which, as the case may be, would require or have the effect of requiring the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating moneys required for its implementation, or

(*b*) that has been or may be, as the case may be, established pursuant to any Act specified in Schedule III. 1966-67, c. 72, s. 56.

Duration and Effect

When agreement effective

57. (1) A collective agreement has effect in respect of a bargaining unit on and from,

(*a*) where an effective date is specified, that day; and

(*b*) where no effective date is specified, the first day of the month next following the month in which the agreement is executed.

Where no provision as to term of agreement

(2) Where a collective agreement contains no provision as to its term, or is for a term of less than one year, the collective agreement shall, subject to subsection 26(6), be deemed to be for a term of one year from the day on and from which it has effect pursuant to subsection (1).

Saving provision

(3) Nothing in subsection (2) shall be construed as preventing the amendment or revision of any provision of a collective agreement, other than a provision relating to the term of the collective agreement, that, under the agreement, may be amended or revised during the term thereof. 1966-67, c. 72, s. 57.

Binding effect of agreement

58. A collective agreement is, subject to and for the purposes of this Act, binding on the employer, on the bargaining agent that is a party thereto and its constituent elements, and on the employees in the bargaining unit in respect of which the bargaining agent has been certified, effective on and from the day on and from which it has effect pursuant to subsection 57(1). 1966-67, c. 72, s. 58.

PART III

PROVISIONS APPLICABLE TO RESOLUTION OF DISPUTES

Provisions of Act applicable depending on process for resolution of dispute

59. Where the employer and the bargaining agent for a bargaining unit have bargained collectively in good faith with a view to concluding a collective agreement but have failed to reach agreement,

(*a*) if the process for resolution of a dispute applicable to the bargaining unit is by the referral thereof to arbitration, sections 63 to 76 apply to the resolution of the dispute; and

(*b*) if the process for resolution of a dispute applicable to the bargaining unit is by the referral thereof to a conciliation board, sections 77 to 89 apply to the resolution of the dispute. 1966-67, c. 72, s. 59.

Arbitration

Board to appoint panels

60. (1) The Board shall appoint two panels, one panel to consist of at least three persons representative of the interests of the employer and the other to consist of at least three persons representative of the interests of employees.

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a) dont la modification ou la suppression ou dont l'établissement, selon le cas, exigerait ou aurait pour effet d'exiger l'adoption ou la modification de quelque loi par le Parlement, sauf aux fins d'affecter les crédits nécessaires à sa mise en œuvre, ou

b) qui a été ou peut être, selon le cas, établie en conformité d'une loi spécifiée à l'annexe III. 1966-67, c. 72, art. 56.

Durée et effet

Entrée en vigueur de la convention

57. (1) Une convention collective entre en vigueur à l'égard d'une unité de négociation à compter

a) de la date d'entrée en vigueur de la convention, si celle-ci en spécifie une; ou

b) à compter du premier jour du mois qui suit immédiatement celui au cours duquel la convention a été signée, si aucune date d'entrée en vigueur n'est spécifiée.

Cas où la convention ne prévoit pas la durée d'application

(2) Si une convention collective ne contient aucune disposition relative à sa durée, ou est établie pour une durée inférieure à une année, elle est réputée, sous réserve du paragraphe 26(6), avoir été établie pour une durée d'un an à compter du jour où elle entre en vigueur conformément au paragraphe (1).

Exception

(3) Rien au paragraphe (2) ne doit s'interpréter comme empêchant la modification ou la revision d'une disposition d'une convention collective, autre qu'une disposition relative à la durée de la convention collective, qui selon les termes de la convention, peut être modifiée ou revisée pendant la durée de ladite convention. 1966-67, c. 72, art. 57.

Caractère obligatoire de la convention

58. Sous réserve et aux fins de la présente loi, une convention collective lie l'employeur et l'agent négociateur qui est partie à celle-ci de même que ses éléments constitutifs, ainsi que les employés de l'unité de négociation pour laquelle l'agent négociateur a été accrédité, à compter du jour où elle entre en vigueur conformément au paragraphe 57(1). 1966-67, c. 72, art. 58.

PARTIE III

DISPOSITIONS APPLICABLES AU RÈGLEMENT DES DIFFÉRENDS

Dispositions de la loi dont l'application dépend de la méthode de règlement des différends

59. Dans le cas où l'employeur et l'agent négociateur d'une unité de négociation ont négocié collectivement de bonne foi en vue de conclure une convention collective mais n'y sont pas parvenus,

a) si la méthode de règlement d'un différend applicable à l'unité de négociation est le renvoi à l'arbitrage, les articles 63 à 76 s'appliquent au règlement du différend; et

b) si la méthode de règlement d'un différend applicable à l'unité de négociation est le renvoi à un bureau de conciliation, les articles 77 à 89 s'appliquent au règlement du différend. 1966-67, c. 72, art. 59.

Arbitrage

Constitution de tableaux par la Commission

60. (1) La Commission constitue deux groupes, l'un composé d'au moins trois personnes représentant les intérêts de l'employeur et l'autre composé d'au moins trois personnes représentant les intérêts des employés.

Tenure of members of panels

(2) A member of a panel appointed by the Board under subsection (1) shall be appointed to hold office for such term as the Board considers appropriate.

Eligibility

(3) A person is not eligible to hold office as a member of a panel if, under subsection 13(1), he is not eligible to be a member of the Board, or if he is a member of the Board except where he is a member of the Board pursuant to a selection under section 61. R.S., c. P-35, s. 60; 1974-75-76, c. 67, s. 12.

Board for arbitration

61. (1) In respect of each dispute referred to arbitration, the Board shall be deemed to consist, for the period of the arbitration proceedings and for the purposes of the arbitration only, of a member of the Board and two other persons one each selected by the Board from each panel appointed under subsection 60(1).

Deemed membership on Board during arbitration proceedings

(2) A person selected by the Board from a panel under subsection (1) shall be deemed to be a member of the Board for the period of the arbitration proceedings in respect of which he is selected.

Qualifications to serve on Board for arbitration

(3) No person shall act as a member of the Board in respect of a matter referred to arbitration if he has at any time since a day six months before the day of his selection under subsection (1) acted in respect of any matter concerning employer-employee relations as solicitor, counsel or agent of the employer or of any employee organization that has an interest in the matter referred to arbitration. R.S., c. P-35, s. 61; 1974-75-76, c. 67, s. 12.

Chairman may appoint outside arbitrator

62. (1) Notwithstanding anything in this Act, if the Chairman considers it advisable to do so, he may appoint an arbitrator in place of the Board in respect of any matters in dispute referred to arbitration under this Act.

Eligibility

(2) A person is not eligible to be appointed as an arbitrator under subsection (1) if,

(*a*) under subsection 13(1), he is not eligible to be a member of the Board;

(*b*) he is a member of the Board or member of a panel appointed by the Board under subsection 60(1); or

(*c*) he is not eligible under subsection 61(3) to act as a member of the Board in respect of a matter referred to arbitration.

Powers of arbitrator

(3) An arbitrator appointed under this section has all the powers of the Board set out in paragraphs 22(*b*) to (*e*).

Sections 67 to 76 apply mutatis mutandis

(4) Sections 67 to 76 apply, with such modifications as the circumstances require, in respect of matters in dispute referred to an arbitrator appointed under subsection (1). R.S., c. P-35, s. 62; 1974-75-76, c. 67, s. 12.

Request for Arbitration

Request for arbitration

63. (1) Where the parties to collective bargaining have bargained collectively in good faith with a view to concluding a collective

Durée du mandat des membres des groupes

(2) Les membres d'un groupe constitué par la Commission en vertu du paragraphe (1) exercent leur mandat pendant la durée que celle-ci juge appropriée.

Admissibilité

(3) Ne peuvent faire partie d'un groupe les personnes qui ne répondent pas aux conditions que prescrit le paragraphe 13(1) pour être membres de la Commission ou qui sont membres de la Commission sauf lorsqu'elles ont été désignées en cette qualité en vertu de l'article 61. S.R., c. P-35, art. 60; 1974-75-76, c. 67, art. 12.

Arbitrage par la Commission

61. (1) Dans le cas d'un différend renvoyé à l'arbitrage, la Commission est réputée se composer, pour la durée des procédures d'arbitrage et pour les seules fins de l'arbitrage, d'un de ses membres et de deux autres personnes qu'elle choisit, l'une et l'autre, au sein de chacun des groupes constitués en vertu du paragraphe 60(1).

Personnes réputées membres de la Commission

(2) Les personnes que la Commission choisit dans les groupes en vertu du paragraphe (1) sont réputées être membres de la Commission pour la durée des procédures d'arbitrage pour lesquelles elles ont été choisies.

Conditions pour faire partie de la Commission

(3) Nul ne peut agir à titre de membre de la Commission relativement à toute question soumise à l'arbitrage s'il est, à quelque moment que ce soit au cours des six mois qui précèdent sa désignation en vertu du paragraphe (1), intervenu, en ce qui concerne toute question touchant les relations entre employeur et employé, en qualité de procureur, conseiller juridique ou mandataire de l'employeur ou d'une association d'employés ayant quelque intérêt dans la question soumise à l'arbitrage. S.R., c. P-35, art. 61; 1974-75-76, c. 67, art. 12.

Faculté de nommer un arbitre spécial extérieur

62. (1) Nonobstant la présente loi, le Président peut, s'il l'estime opportun, nommer un arbitre spécial à la place de la Commission relativement à toute question faisant l'objet d'un différend, soumise à l'arbitrage en vertu de la présente loi.

Qualités requises

(2) Ne peuvent être nommées arbitres spéciaux en vertu du paragraphe (1) les personnes

a) qui ne répondent pas aux conditions que prescrit le paragraphe 13(1) pour être membre de la Commission;

b) qui sont membres de la Commission ou d'un groupe constitué par la Commission en vertu du paragraphe 60(1); ou

c) qui ne répondent pas aux conditions que prescrit le paragraphe 61(3) pour agir en qualité de membre de la Commission relativement à une question soumise à l'arbitrage.

Pouvoirs de l'arbitre

(3) L'arbitre spécial nommé en vertu du présent article est investi de tous les pouvoirs de la Commission énumérés aux alinéas 22*b*) à *e*).

Application mutatis mutandis des articles 67 à 76

(4) Les articles 67 à 76 s'appliquent, avec les modifications que requièrent les circonstances, aux questions faisant l'objet d'un différend, soumises à un arbitre spécial nommé en vertu du paragraphe (1). S.R., c. P-35, art. 62; 1974-75-76, c. 67, art. 12.

Demande d'arbitrage

Demande d'arbitrage

63. (1) Lorsque les parties à une convention collective ont négocié collectivement de bonne foi en vue de conclure une convention collecagreement but have been unable to reach agreement on any term or condition of employment of employees in the relevant bargaining unit that may be embodied in an arbitral award, either party may, by notice in writing to the Secretary of the Board given

(*a*) at any time, where no collective agreement has been entered into by the parties and no request for arbitration has been made by either party since the commencement of the bargaining, or

(*b*) not later than seven days after any collective agreement is entered into by the parties, in any other case,

request arbitration in respect of that term or condition of employment.

Notice to be given

(2) Where arbitration is requested by notice under subsection (1), the party making the request shall

(*a*) specify in the notice the terms and conditions of employment in respect of which it requests arbitration and its proposals concerning the award to be made by the Board in respect thereof, and

(*b*) annex to the notice a copy of any collective agreement entered into by the parties. R.S., c. P-35, s. 63; 1974-75-76, c. 67, s. 13.

Request for arbitration by other party

64. (1) Where notice under section 63 is received by the Secretary of the Board from any party requesting arbitration, the Secretary shall forthwith send a copy of the notice to the other party, who shall within seven days after receipt thereof advise the Secretary, by notice in writing, of any matter, additional to the matters specified in the notice under section 63, that was a subject of negotiation between the parties during the period before the arbitration was requested but on which the parties were unable to reach agreement, and in respect of which, being a matter that may be embodied in an arbitral award, that other party requests arbitration.

Notice to include proposal concerning award

(2) Where arbitration in respect of any matter is requested by notice under subsection (1), the party making the request shall include in the notice its proposal concerning the award to be made by the Board in respect thereof. R.S., c. P-35, s. 64; 1974-75-76, c. 67, s. 14.

65. and **66.** [Repealed, 1974-75-76, c. 67, s. 15.]

Consideration of Dispute and Award

Matters constituting terms of reference

67. (1) Subject to section 70, the matters in dispute specified in the notice under section 63 and in any notice under section 64 constitute the terms of reference of the Board in relation to the request for arbitration, and the Board shall, after considering the matters in dispute together with any other matter that the Board considers necessarily incidental to the resolution of the matters in dispute, render an arbitral award in respect thereof.

Where agreement subsequently reached

(2) Where, at any time before an arbitral award is rendered, the parties reach agreement on any matter in dispute referred to the Board under subsection (1) and enter into a collective agreement in respect thereof, the matters in dispute so referred to the Board shall be deemed not to include that matter and no arbitral award shall be rendered by the Board in respect thereof. R.S., c. P-35, s. 67; 1974-75-76, c. 67, s. 16.

tive, mais n'ont pu arriver à un accord sur l'une des conditions d'emploi des employés de l'unité de négociation en cause susceptibles d'être incluses dans une décision arbitrale, chacune des parties peut, au moyen d'un avis écrit adressé au secrétaire de la Commission

a) en tout temps, quand aucune convention collective n'a été conclue entre les parties et qu'aucune demande d'arbitrage n'a été présentée par l'une ou l'autre des parties depuis le commencement de la négociation, ou

b) au plus tard sept jours après que les parties ont conclu une convention collective, dans tout autre cas,

demander l'arbitrage au sujet de cette condition d'emploi.

Avis à donner

(2) Lorsque l'arbitrage est demandé par avis en vertu du paragraphe (1), la partie en faisant la demande doit

a) spécifier dans l'avis les conditions d'emploi pour lesquelles elle demande l'arbitrage et préciser ses propositions quant à la décision arbitrale que la Commission doit rendre en l'espèce, et

b) annexer à l'avis copie de toute convention collective conclue par les parties. S.R., c. P-35, art. 63; 1974-75-76, c. 67, art. 13.

Demande d'arbitrage par l'autre partie

64. (1) Lorsque le secrétaire de la Commission reçoit un avis aux termes de l'article 63, de l'une ou l'autre des parties demandant l'arbitrage, il doit immédiatement envoyer copie de l'avis à l'autre partie. Celle-ci doit, dans les sept jours après la réception de cette pièce, communiquer au secrétaire, par avis écrit, toute question qui, en plus de celles que spécifie l'avis donné aux termes de l'article 63, a fait l'objet de négociations entre les parties avant que ne soit demandé l'arbitrage, mais au sujet de laquelle elles n'ont pas pu arriver à un accord et relativement à laquelle, du fait qu'il s'agit d'une question qui peut être incluse dans une décision arbitrale, cette autre partie demande l'arbitrage.

L'avis doit contenir une proposition de décision arbitrale

(2) Lorsque l'arbitrage concernant toute question est demandé par avis selon le paragraphe (1), la partie qui formule la demande doit inclure dans l'avis sa proposition au sujet de la décision arbitrale que la Commission doit prendre en l'espèce. S.R., c. P-35, art. 64; 1974-75-76, c. 67, art. 14.

65. et **66.** [Abrogés, 1974-75-76, c. 67, art. 15.]

Examen du différend et décision

Objet du mandat

67. (1) Sous réserve de l'article 70, les questions qui font l'objet d'un différend, spécifiées dans l'avis prévu par l'article 63 et dans tout avis prévu par l'article 64, constituent le mandat de la Commission en ce qui concerne la demande d'arbitrage. La Commission doit, après examen des questions qui font l'objet du différend ainsi que de toute autre question qu'elle estime nécessairement liée à la solution des questions soulevées par le différend, rendre une décision arbitrale en l'espèce.

Lorsque les parties parviennent à un accord par la suite

(2) Si avant qu'une décision arbitrale ne soit rendue, les parties arrivent à un accord sur une question faisant l'objet du différend soumise à la Commission en vertu du paragraphe (1) et concluent une convention collective y relative, les questions qui font l'objet du différend renvoyées à la Commission sont réputées ne pas comprendre cette question et la Commission ne doit pas rendre de décision arbitrale au sujet de cette question. S.R. c. P-35, art. 67; 1974-75-76, c. 67, art. 16.

Factors to be taken into account by Board

68. In the conduct of proceedings before it and in rendering an arbitral award in respect of a matter in dispute, the Board shall consider

(*a*) the needs of the Public Service for qualified employees;

(*b*) the conditions of employment in similar occupations outside the Public Service, including such geographic, industrial or other variations as the Board may consider relevant;

(*c*) the need to maintain appropriate relationships in the conditions of employment as between different grade levels within an occupation and as between occupations in the Public Service;

(*d*) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and

(*e*) any other factor that to it appears to be relevant to the matter in dispute. R.S., c. P-35, s. 68; 1974-75-76, c. 67, s. 17.

Parties to be heard

69. Subject to this Act, the Board shall, before rendering an arbitral award in respect of a matter in dispute, give full opportunity to both parties to present evidence and make submissions to it. R.S., c. P-35, s. 69; 1974-75-76, c. 67, s. 18.

Subject-Matter of Arbitral Award

Subject-matter of arbitral award

70. (1) Subject to this section, an arbitral award may deal with rates of pay, hours of work, leave entitlements, standards of discipline and other terms and conditions of employment directly related thereto.

Award not to require legislative implementation

(2) Subsection 56(2) applies, *mutatis mutandis*, in relation to an arbitral award.

Matters not to be dealt with by award

(3) No arbitral award shall deal with the standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees, or with any term or condition of employment of employees that was not a subject of negotiation between the parties during the period before arbitration was requested in respect thereof.

Award to be limited

(4) An arbitral award shall deal only with terms and conditions of employment of employees in the bargaining unit in respect of which the request for arbitration was made. 1966-67, c. 72, s. 70.

Making of Arbitral Award

Award to be signed

71. (1) An arbitral award shall be signed by the member of the Board who is not a member selected from a panel appointed under section 60 and copies thereof shall be transmitted to the parties to the dispute and no report or observations thereon shall be made or given by either of the members selected from a panel appointed under section 60.

Decision

(2) A decision of the majority of the members of the Board in respect of the matters in dispute, or where a majority of such members cannot agree on the terms of the arbitral award to be rendered in respect thereof, the decision of the member of the Board who is not a

Facteurs dont la Commission doit tenir compte

68. En dirigeant les débats de ses audiences et en rendant une décision arbitrale au sujet d'un différend, la Commission doit considérer les facteurs suivants:

a) les besoins de personnel qualifié dans la Fonction publique;

b) les conditions d'emploi dans des postes analogues hors de la Fonction publique, notamment les écarts attribuables à des considérations géographiques, industrielles ou autres que la Commission peut juger pertinentes;

c) la nécessité de maintenir des rapports convenables, quant aux conditions d'emploi, entre les divers échelons au sein d'une même occupation et entre les diverses occupations au sein de la Fonction publique;

d) la nécessité d'établir des conditions d'emploi justes et raisonnables, compte tenu des qualités requises, du travail accompli, de la responsabilité assumée et de la nature des services rendus; et

e) tout autre facteur qui, à son avis, se rapporte au différend. S.R., c. P-35, art. 68; 1974-75-76, c. 67, art. 17.

Audition des parties

69. Sous réserve des dispositions particulières de la présente loi, la Commission doit, avant de rendre une décision arbitrale relativement à une question faisant l'objet d'un différend, fournir aux deux parties l'occasion de lui présenter leurs moyens de preuve et de lui faire valoir leurs points de vue. S.R., c. P-35, art. 69; 1974-75-76, c. 67, art. 18.

Objets de la décision arbitrale

Objet de la décision arbitrale

70. (1) Sous réserve du présent article, une décision arbitrale peut statuer sur les taux de traitement, les heures de travail, les droits à des congés, les normes disciplinaires et autres conditions d'emploi qui s'y rattachent directement.

La décision ne doit pas nécessiter une mesure législative

(2) Le paragraphe 56(2) s'applique, *mutatis mutandis*, en ce qui concerne une décision arbitrale.

Questions qui ne doivent pas être réglées par décision arbitrale

(3) Une décision arbitrale ne doit statuer ni sur les normes, procédures et méthodes régissant la nomination, l'appréciation, l'avancement, la rétrogradation, la mutation, la mise en disponibilité ou le renvoi des employés ni sur une condition d'emploi qui n'a pas fait l'objet de négociations entre les parties avant que ne soit demandé l'arbitrage à leur sujet.

Limitation de la décision arbitrale

(4) Une décision arbitrale ne doit statuer que sur les conditions d'emploi des employés dans une unité de négociation relativement à laquelle la demande d'arbitrage a été faite. 1966-67, c. 72, art. 70.

Établissement de la décision arbitrale

Signature de la décision

71. (1) La décision arbitrale doit être signée par le membre de la Commission qui n'émane pas des groupes constitués en vertu de l'article 60; des exemplaires doivent en être transmis aux parties au différend et les membres émanant des groupes constitués en vertu de l'article 60 ne doivent faire ni communiquer un rapport ou une observation sur la décision prise.

Décision

(2) Lorsqu'une décision prise à la majorité des membres de la Commission intervient relativement aux questions qui font l'objet du différend, ou lorsque la majorité de ces membres ne peuvent se mettre d'accord sur les modalités de la décision arbitrale qui doit être rendue au

member selected from a panel appointed under section 60 shall be the arbitral award in respect of the matters in dispute.

Form of award

(3) An arbitral award shall, wherever possible, be made in such form

(*a*) as will be susceptible of being read and interpreted with, or annexed to and published with, any collective agreement dealing with other terms and conditions of employment of the employees in the bargaining unit in respect of which the arbitral award applies; and

(*b*) as will enable its incorporation into and implementation by regulations, by-laws, directives or other instruments that may be required to be made or issued by the employer or the relevant bargaining agent in respect thereof. R.S., c. P-35, s. 71; 1974-75-76, c. 67, s. 19.

Duration and Operation of Arbitral Awards

Binding effect of arbitral award

72. (1) An arbitral award is, subject to and for the purposes of this Act, binding on the employer and the bargaining agent that is a party thereto and on the employees in the bargaining unit in respect of which the bargaining agent has been certified, effective on and from the day on which the award is rendered or such later day as the Board may determine.

Retroactive application

(2) A provision of an arbitral award made in respect of a term or condition of employment may be retroactive to the extent that it is capable of being retroactively applied, in whole or in part, to a day prior to the day on and from which the arbitral award becomes binding on the parties but not before,

(*a*) in the case of an arbitral award rendered during the initial certification period, a day six months before the day specified in Column II of Schedule II applicable to the occupational category in which the employees in respect of whom the award is made are included, and

(*b*) in any other case, the day on which notice to bargain collectively was given by either party.

Effect on previous collective agreement or award

(3) Where, in relation to any or all of the provisions of an arbitral award made in respect of terms and conditions of employment, there was previously in effect a collective agreement or arbitral award, the previous collective agreement or the previous arbitral award is displaced, to the extent of any conflict, for the term, determined in accordance with section 73, for which the subsequent award is operative. R.S., c. P-35, s. 72; 1974-75-76, c. 67, s. 20.

Term of arbitral award

73. (1) The Board shall, in respect of every arbitral award, determine and specify therein the term for which the arbitral award is to be operative and, in making its determination, it shall take into account,

(*a*) where a collective agreement applicable to the bargaining unit is in effect or has been entered into but is not yet in effect, the term of that collective agreement; and

(*b*) where no collective agreement applying to the bargaining unit has been entered into,

sujet de ces questions, la décision du membre de la Commission qui n'émane pas des groupes constitués en vertu de l'article 60 constitue la décision arbitrale relative aux questions qui font l'objet du différend.

Forme de la décision arbitrale

(3) Une décision arbitrale doit, chaque fois que la chose est possible, prendre une forme

a) qui puisse être lue et interprétée conjointement avec une convention collective statuant sur d'autres conditions d'emploi des employés de l'unité de négociation relativement à laquelle s'applique la décision arbitrale; ou être *jointe* à une telle convention et être publiée en même temps que celle-ci; et

b) qui permette son insertion dans les règlements, les statuts administratifs, les instructions ou autres instruments que l'employeur ou l'agent négociateur compétent peuvent être tenus d'établir ou d'émettre en l'espèce et son application au moyen desdits instruments. S.R., c. P-35, art. 71; 1974-75-76, c. 67, art. 19.

Durée et application des décisions arbitrales

Effet obligatoire des décisions arbitrales

72. (1) Sous réserve et aux fins de la présente loi, une décision arbitrale lie l'employeur et l'agent négociateur qui y est partie ainsi que les employés de l'unité de négociation à l'égard de laquelle l'agent négociateur a été accrédité, à compter du jour où la décision arbitrale est rendue, ou de telle date ultérieure que la Commission peut fixer.

Effet rétroactif

(2) Une disposition d'une décision arbitrale rendue relativement à une condition d'emploi peut être rétroactive, dans la mesure où elle est susceptible d'avoir un effet rétroactif, en tout ou partie, à compter d'une date antérieure à celle à partir de laquelle la décision arbitrale lie les parties mais non antérieure,

a) dans le cas d'une décision arbitrale rendue durant la période d'accréditation initiale, à une date antérieure de six mois à celle que la Colonne II de l'annexe II déclare être applicable à la catégorie d'occupations dans laquelle sont inclus les employés à l'égard de qui la décision arbitrale est rendue; et

b) dans tout autre cas, à la date à laquelle l'avis de négocier collectivement a été donné par l'une ou l'autre partie.

Effet sur une convention ou décision arbitrale antérieures

(3) Lorsque, relativement à l'ensemble ou quelque partie des dispositions d'une décision arbitrale rendue au sujet des conditions d'emploi, une convention collective ou une décision arbitrale était antérieurement en vigueur, lesdites dispositions de la décision arbitrale subséquente sont substituées à cette convention ou décision antérieure, en ce qui concerne tout litige, pendant la période d'application de la décision arbitrale subséquente, fixée en conformité de l'article 73. S.R., c. P-35, art. 72; 1974-75-76, c. 67, art. 20.

Durée de la décision arbitrale

73. (1) La Commission doit, relativement à chaque décision arbitrale, établir et y spécifier la durée pendant laquelle elle doit s'appliquer. En le faisant, elle doit tenir compte,

a) si une convention collective applicable à l'unité de négociation est en vigueur ou a été conclue mais n'est pas encore entrée en vigueur, de la durée de cette convention collective; et

b) si aucune convention collective s'appliquant à l'unité de négociation n'a été conclue,

(i) the term of any previous collective agreement that applied to the bargaining unit, or

(ii) the term of any other collective agreement that to the Board appears relevant.

Limitation on term of award

(2) Subject to subsection 26(6), no arbitral award, in the absence of the application thereto of any criterion referred to in paragraph (1)(*a*) or (*b*), shall be for a term of less than one year or more than two years from the day on and from which it becomes binding on the parties. R.S., c. P-35, s. 73; 1974-75-76, c. 67, s. 21.

Implementation of Arbitral Awards

Implementation of awards

74. The rates of pay, hours of work, leave entitlements, standards of discipline and other terms and conditions of employment directly related thereto that are the subject of an arbitral award shall, subject to the appropriation by or under the authority of Parliament of any moneys that may be required by the employer therefor, be implemented by the parties within a period of ninety days from the date on and from which it becomes binding on the parties or within such longer period as, on application to the Board by either party, appears reasonable to the Board. 1966-67, c. 72, s. 74.

Completion and Variation of Arbitral Awards

Reference back to Board

75. Where in respect of an arbitral award it appears to either of the parties that the Board has failed to deal with any matter in dispute referred to it, such party may, within seven days from the day the award is rendered, refer the matter back to the Board, and the Board shall thereupon deal with the matter. R.S., c. P-35, s. 75; 1974-75-76, c. 67, s. 22.

Authority to amend or vary award

76. The Board may, upon application jointly by both parties to an arbitral award, amend, alter or vary any provision of that award where it is made to appear to the Board that the amendment, alteration or variation thereof is warranted having regard to circumstances that have arisen since the making of the award or of which the Board did not have notice at the time of the making thereof, or having regard to such other circumstances as the Board deems relevant. R.S., c. P-35, s. 76; 1974-75-76, c. 67, s. 22.

Conciliation Boards

Request for Establishment of Conciliation Board

Request for conciliation board

77. Where the parties to collective bargaining have bargained collectively in good faith with a view to concluding a collective agreement but have been unable to reach agreement on any term or condition of employment of employees in the relevant bargaining unit that may be embodied in a collective agreement, either party may, by notice in writing to the Chairman, request the establishment of a conciliation board for the investigation and conciliation of the dispute. 1966-67, c. 72, s. 77.

Establishment of Conciliation Board

Establishment of conciliation board where requested by either party

78. (1) Where, in respect of a dispute,

(*a*) any conciliator that may have been appointed under section 52 has made a final report to the Chairman that he has been

(i) de la durée de toute convention collective antérieure qui s'appliquait à cette unité de négociation, ou

(ii) de la durée de toute autre convention collective qu'elle estime pertinente.

(2) Sous réserve du paragraphe 26(6), une décision arbitrale, à laquelle ne s'applique aucun des critères mentionnés aux alinéas (1)*a*) ou *b*), ne peut pas avoir une durée inférieure à un an ou supérieure à deux ans, à compter de la date à partir de laquelle elle lie les parties. S.R., c. P-35, art. 73; 1974-75-76, c. 67, art. 21.

Limitation de la durée d'une décision arbitrale

Mise en œuvre des décisions arbitrales

74. Le traitement, les heures de travail, le droit à des congés, les normes disciplinaires et les autres conditions d'emploi immédiatement connexes, sur lesquels porte une décision arbitrale doivent, sous réserve de l'affectation, par le Parlement ou en vertu de son autorité, des crédits dont l'employeur peut avoir besoin à ces fins, être appliqués par les parties dans un délai de quatre-vingt-dix jours à compter de la date à partir de laquelle la décision arbitrale lie les parties ou dans le délai plus long que la Commission juge raisonnable d'accorder sur demande de l'une des parties. 1966-67, c. 72, art. 74.

Mise en œuvre des décisions arbitrales

Exécution et modification des décisions arbitrales

75. Lorsque, relativement à une décision arbitrale, il apparaît à l'une ou l'autre des parties que la Commission n'a pas réussi à régler une question faisant l'objet d'un différend qui lui a été renvoyée, cette partie peut, dans les sept jours de la décision arbitrale, renvoyer de nouveau la question à la Commission qui doit alors l'examiner. S.R., c. P-35, art. 75; 1974-75-76, c. 67, art. 22.

Nouveau renvoi

76. La Commission peut, sur demande conjointe des deux parties à une décision arbitrale, modifier ou changer toute disposition de cette décision arbitrale lorsqu'il lui est démontré que la modification ou le changement de cette disposition est justifié eu égard aux circonstances qui ont pris naissance depuis que la décision arbitrale a été rendue ou dont elle n'avait pas été informée au moment où elle a rendu sa décision arbitrale ou eu égard aux autres circonstances qu'elle estime pertinentes. S.R., c. P-35, art. 76; 1974-75-76, c. 67, art. 22.

Pouvoir de modifier une décision arbitrale

Bureaux de conciliation

Demande d'établissement d'un bureau de conciliation

77. Lorsque les parties à des négociations collectives ont négocié collectivement de bonne foi en vue de conclure une convention collective mais n'ont pu se mettre d'accord, en ce qui concerne les employés de l'unité de négociation en cause, sur aucune condition d'emploi pouvant être incluse dans une convention collective, l'une ou l'autre partie peut, par avis écrit au Président, demander l'établissement d'un bureau de conciliation chargé de l'enquête et de la conciliation du différend. 1966-67, c. 72, art. 77.

Demande d'établissement d'un bureau de conciliation

Établissement d'un bureau de conciliation

78. (1) Lorsque, relativement à un différend,

a) un conciliateur qui peut avoir été nommé en vertu de l'article 52 a fait au président un rapport définitif indiquant qu'il a été incapa-

Établissement d'un bureau de conciliation lorsque l'une ou l'autre partie le demande unable to assist the parties in reaching agreement, and

(*b*) either party has requested the establishment of a conciliation board,

the Chairman shall establish a board for the investigation and conciliation of the dispute unless it appears to him, after consultation with each of the parties, that the establishment of such a board is unlikely to serve the purpose of assisting the parties in reaching agreement, in which case the Chairman shall forthwith notify the parties in writing of his intention not to establish such a board.

Establishment of conciliation board in other cases

(2) In any case not provided for under subsection (1), the Chairman may establish a board for the investigation and conciliation of a dispute where it appears to him that the establishment of such a board may serve the purpose of assisting the parties in reaching agreement, and that without the establishment of such a board the parties are unlikely to reach agreement, but before establishing such a board the Chairman shall notify the parties of his intention to do so. 1966-67, c. 72, s. 78.

Designated employees

79. (1) Notwithstanding section 78, no conciliation board shall be established for the investigation and conciliation of a dispute in respect of a bargaining unit until the parties have agreed on or the Board has determined pursuant to this section the employees or classes of employees in the bargaining unit (hereinafter in this Act referred to as "designated employees") whose duties consist in whole or in part of duties the performance of which at any particular time or after any specified period of time is or will be necessary in the interest of the safety or security of the public.

Employer to furnish statement

(2) Within twenty days after notice to bargain collectively is given by either of the parties to collective bargaining, the employer shall furnish to the Board and the bargaining agent for the relevant bargaining unit a statement in writing of the employees or classes of employees in the bargaining unit who are considered by the employer to be designated employees.

Agreement or objection

(3) If no objection to the statement referred to in subsection (2) is filed with the Board by the bargaining agent within such time after the receipt thereof by the bargaining agent as the Board may prescribe, such statement shall be taken to be a statement of the employees or classes of employees in the bargaining unit who are agreed by the parties to be designated employees, but where an objection to such statement is filed with the Board by the bargaining agent within the time so prescribed, the Board, after considering the objection and affording each of the parties an opportunity to make representations, shall determine which of the employees or classes of employees in the bargaining unit are designated employees.

Determination to be communicated to parties

(4) A determination made by the Board pursuant to subsection (3) is final and conclusive for all purposes of this Act, and shall be communicated in writing by the Chairman to the parties as soon as possible after the making thereof.

Employees to be informed

(5) Within such time and in such manner as the Board may prescribe, all employees in a bargaining unit who are agreed by the parties

ble d'aider les parties à se mettre d'accord, et que

b) l'une des parties a demandé l'établissement d'un bureau de conciliation,

le Président doit établir un bureau chargé de l'enquête et de la conciliation du différend à moins qu'il ne lui apparaisse, après consultation avec chacune des parties, que l'établissement d'un tel bureau ne peut vraisemblablement pas aider les parties à se mettre d'accord, auquel cas le Président doit aussitôt adresser aux parties un avis écrit de son intention de ne pas établir un tel bureau.

Établissement d'un bureau de conciliation dans d'autres cas

(2) Dans tout cas non prévu au paragraphe (1), le Président peut établir un bureau chargé de l'enquête et de la conciliation d'un différend lorsqu'il lui semble que l'établissement d'un tel bureau peut aider les parties à se mettre d'accord et que, sans l'établissement d'un tel bureau, elles ne se mettront vraisemblablement pas d'accord. Toutefois, avant d'établir un tel bureau, le Président doit notifier aux parties son intention d'y procéder. 1966-67, c. 72, art. 78.

Employés désignés

79. (1) Nonobstant l'article 78, il ne doit pas être établi de bureau de conciliation pour l'enquête et la conciliation d'un différend relatif à une unité de négociation tant que les parties ne se sont pas mises d'accord ou que la Commission n'a pris, aux termes du présent article, aucune décision sur la question de savoir quels sont les employés ou les classes d'employés de l'unité de négociation (ci-après dans la présente loi appelés «employés désignés») dont les fonctions sont, en tout ou en partie, des fonctions dont l'exercice à un moment particulier ou après un délai spécifié est ou sera nécessaire dans l'intérêt de la sûreté ou de la sécurité du public.

L'employeur doit fournir un état

(2) Dans les vingt jours qui suivent celui où l'avis de négociations collectives est donné par l'une ou l'autre des parties aux négociations collectives, l'employeur doit fournir à la Commission et à l'agent négociateur de l'unité de négociation en cause un relevé des employés ou classes d'employés de l'unité de négociation que l'employeur considère comme des employés désignés.

Accord ou objection

(3) Si aucune opposition au relevé mentionné au paragraphe (2) n'est faite à la Commission par l'agent négociateur dans tel délai consécutif à la réception de ce relevé par l'agent négociateur que peut fixer la Commission, ce relevé doit être considéré comme un relevé des employés ou des classes d'employés de l'unité de négociation qui, par convention des parties, sont des employés désignés. Toutefois, lorsqu'une opposition à ce relevé est faite à la Commission par l'agent négociateur dans le délai ainsi prescrit, la Commission, après avoir examiné l'opposition et avoir donné à chaque partie l'occasion de communiquer ses observations, doit décider quels employés ou quelles classes d'employés de l'unité de négociation sont des employés désignés.

La décision doit être communiquée aux parties

(4) Une décision prise par la Commission en conformité du paragraphe (3) est définitive et péremptoire à toutes fins de la présente loi. Le Président doit la communiquer par écrit aux parties aussitôt que possible.

Les employés doivent être mis au courant

(5) Dans le délai et de la manière que peut prescrire la Commission, tous les employés d'une unité de négociation qui sont, par conven-

or determined by the Board pursuant to this section to be designated employees shall be so informed by the Board. 1966-67, c. 72, s. 79.

Constitution 80. (1) A conciliation board shall consist of three persons appointed in the manner provided in this section.

Appointment of members (2) When a conciliation board is to be established, the Chairman shall by notice require each of the parties, within seven days from the receipt of such notice, to nominate one person each to be a member of the conciliation board, and upon receipt of the nominations within those seven days, the Chairman shall appoint the persons so nominated as members of the conciliation board.

Idem (3) If either of the parties fails to nominate a person within seven days from the receipt by it of the notice referred to in subsection (2), the Chairman shall appoint as a member of the conciliation board a person he deems fit for the purpose, and such member shall be deemed to have been appointed on the nomination of that party.

Appointment of chairman (4) The two members appointed under subsection (2) or (3) shall, within five days after the day on which the second of them was appointed, nominate a third person who is ready and willing to act, to be chairman of the conciliation board, and the Chairman shall thereupon appoint such person as the chairman of the conciliation board.

Idem (5) If the two members appointed under subsection (2) or (3) fail to make such a nomination within five days after the second of them was appointed, the Chairman shall forthwith appoint as the chairman of the conciliation board a person he deems fit for the purpose.

Qualification of members (6) Subsections 60(3) and 61(3) apply, with such modifications as the circumstances require, in relation to the qualification of persons to act as members of a conciliation board.

Allowances payable to members (7) The members of a conciliation board are entitled to be paid such *per diem* or other allowances with respect to the performance of their duties under this Act as may be fixed by the Governor in Council. R.S., c. P-35, s. 80; 1974-75-76, c. 67, s. 23.

Vacancies 81. Where any vacancy occurs in the membership of a conciliation board before the board has reported its findings and recommendations to the Chairman, the vacancy shall be filled by the Chairman by appointment in the manner provided in section 80 for the selection of the person in respect of whom the vacancy arose. 1966-67, c. 72, s. 81.

Notification of establishment 82. (1) Forthwith upon the establishment of a conciliation board, the Chairman shall notify the parties of its establishment and of the names of its members.

Effect of notification (2) Upon the notification of the parties by the Chairman of the establishment of a conciliation board, it shall be conclusively presumed that the conciliation board described in the notice has been established in accordance with this Act, and no order shall be made or process entered, and no proceedings shall be taken in any court, to question the establishment of the conciliation board or to review,

tion des parties ou par décision de la Commission en conformité du présent article, des employés désignés doivent en être informés par la Commission. 1966-67, c. 72, art. 79.

80. (1) Un bureau de conciliation comprend trois personnes nommées de la façon prévue au présent article. **Constitution**

(2) Lorsqu'un bureau de conciliation doit être établi, le Président doit au moyen d'un avis requérir chacune des parties, dans les sept jours à compter de la réception de l'avis, de choisir une personne pour être membre du bureau de conciliation. Sur réception des choix faits dans ce délai de sept jours, le Président doit nommer les personnes ainsi choisies membres du bureau de conciliation. **Nomination des membres**

(3) Si l'une des parties omet de choisir une personne dans les sept jours à compter de la réception par elle de l'avis mentionné au paragraphe (2), le Président nomme membre du bureau de conciliation une personne qu'il estime apte à occuper cette charge. Ce membre est réputé avoir été nommé sur le choix de cette partie. **Idem**

(4) Les deux membres nommés en vertu des paragraphes (2) ou (3) choisissent, dans les cinq jours qui suivent celui où le second d'entre eux est nommé, pour faire fonction de président du bureau de conciliation, une troisième personne disposée à agir en cette qualité. Dès lors, le Président nomme cette personne président du bureau de conciliation. **Nomination du président**

(5) Si les deux membres nommés aux termes des paragraphes (2) ou (3) omettent de faire un tel choix dans les cinq jours qui suivent la nomination du second d'entre eux, le Président doit immédiatement nommer président du bureau de conciliation une personne qu'il estime apte à occuper cette charge. **Idem**

(6) Les paragraphes 60(3) et 61(3) s'appliquent, avec les modifications que commandent les circonstances, en ce qui concerne les qualités requises pour être membre d'un bureau de conciliation. **Qualités requises pour être membre**

(7) Les membres d'un bureau de conciliation ont droit de recevoir, pour l'accomplissement de leurs fonctions aux termes de la présente loi, les allocations journalières ou autres que peut fixer le gouverneur en conseil. S.R., c. P-35, art. 80; 1974-75-76, c. 67, art. 23. **Allocations payables aux membres**

81. S'il se produit une vacance parmi les membres d'un bureau de conciliation avant que le bureau ait fait rapport au Président de ses conclusions et de ses recommandations, le Président doit pourvoir à la vacance par une nomination de la manière prévue à l'article 80 pour le choix du titulaire du poste vacant. 1966-67, c. 72, art. 81. **Vacances**

82. (1) Immédiatement après l'établissement d'un bureau de conciliation, le Président doit aviser les parties de son établissement et leur communiquer les noms de ses membres. **Notification de l'établissement**

(2) Dès que le Président a notifié aux parties l'établissement d'un bureau de conciliation, il doit être présumé d'une façon concluante que le bureau de conciliation décrit dans l'avis a été établi en conformité de la présente loi. Aucune ordonnance ne doit être rendue, aucun moyen mis en œuvre, aucune procédure instituée devant un tribunal quelconque pour contester l'établissement du bureau de conciliation, ou **Effet de cette notification**

prohibit or restrain any of its proceedings. 1966-67, c. 72, s. 82.

Terms of Reference

Terms of reference of conciliation board

83. Forthwith upon the establishment of a conciliation board, the Chairman shall deliver to the conciliation board a statement setting forth the matters on which the board shall report its findings and recommendations to the Chairman, and the Chairman may, either before or after the report to him of its findings and recommendations, amend such statement by adding thereto or deleting therefrom any matter he deems necessary or advisable in the interest of assisting the parties in reaching agreement. 1966-67, c. 72, s. 83.

Procedure

Duties of conciliation board

84. (1) A conciliation board shall, as soon as possible after the receipt by it of the statement referred to in section 83, endeavour to bring about agreement between the parties in relation to the matters set forth in the statement.

Rules of procedure

(2) Except as otherwise provided in this Act, a conciliation board may determine its own procedure, but shall give full opportunity to both parties to present evidence and make representations.

Sittings

(3) The chairman of a conciliation board may, after consultation with the other members of the board, fix the times and places of its sittings and shall notify the parties of the times and places so fixed.

Quorum and absence of members

(4) The chairman of a conciliation board and one other member constitute a quorum, but in the absence of a member at any sitting of the board the other members shall not proceed unless the absent member has been given reasonable notice of the sitting.

Decision

(5) A decision of a majority of the members of a conciliation board on any matter referred to it is a decision of the board thereon.

Report of proceedings

(6) The chairman of a conciliation board shall forward to the Chairman a detailed statement signed by him of the sittings of the conciliation board and of the members and witnesses present at each sitting. 1966-67, c. 72, s. 84.

Powers of conciliation board

85. A conciliation board has all the powers of the Board set out in paragraphs 22(*a*) to (*e*) and, in addition, may authorize any person to exercise any of the powers of the conciliation board as set out in paragraphs 22(*b*) to (*e*), and report to the conciliation board thereon. 1966-67, c. 72, s. 85.

Report

Report to Chairman

86. (1) A conciliation board shall, within fourteen days after the receipt by it of the statement referred to in section 83 or within such longer period as may be agreed upon by the parties or determined by the Chairman, report its findings and recommendations to the Chairman.

Report not to require legislative implementation

(2) Subsection 56(2) applies, *mutatis mutandis*, in relation to a recommendation in a report of a conciliation board.

Matters not to be dealt with by report

(3) No report of a conciliation board shall contain any recommendation concerning the standards, procedures or processes governing

pour examiner, interdire ou restreindre son activité. 1966-67, c. 72, art. 82.

Mandat

Mandat du bureau de conciliation

83. Immédiatement après l'établissement d'un bureau de conciliation, le Président doit lui remettre le relevé indiquant les questions sur lesquelles le bureau doit lui faire rapport de ses conclusions et recommandations. Le Président peut, avant ou après la transmission à lui faite dudit rapport, modifier ce relevé en y ajoutant ou en en retranchant toute question qu'il estime nécessaire ou opportun d'inclure ou d'omettre pour aider les parties à se mettre d'accord. 1966-67, c. 72, art. 83.

Procédure

Devoirs du bureau de conciliation

84. (1) Un bureau de conciliation doit, aussitôt que possible après avoir reçu le relevé visé à l'article 83, s'efforcer de mettre les parties d'accord sur les questions indiquées dans le relevé.

Règles de procédure

(2) Sous réserve de la présente loi, un bureau de conciliation peut établir la procédure qui le régit, en laissant toutefois aux deux parties l'occasion de présenter leurs moyens de preuve et de faire valoir leur point de vue.

Séances

(3) Le président d'un bureau de conciliation peut, après avoir consulté les autres membres du bureau, fixer les heures et les lieux de ses séances. Il doit notifier aux parties les heures et les lieux ainsi fixés.

Quorum et absence des membres

(4) Le président du bureau de conciliation et un autre membre constituent le quorum. Toutefois pendant l'absence d'un membre à quelque séance du bureau, les autres membres ne peuvent agir que si l'absent a reçu un avis raisonnable de la tenue de la séance.

Décision

(5) Une décision de la majorité des membres d'un bureau de conciliation sur toute question qui lui est soumise constitue une décision du bureau à cet égard.

Communication des relevés des séances

(6) Le président d'un bureau de conciliation doit envoyer au Président, après l'avoir signé, un relevé détaillé des séances du bureau de conciliation et des membres et des témoins qui étaient présents à chaque séance. 1966-67, c. 72, art. 84.

Pouvoirs du bureau de conciliation

85. Un bureau de conciliation possède tous les pouvoirs de la Commission, énumérés aux alinéas 22*a*) à *e*). Il peut en outre autoriser quiconque à exercer n'importe lequel ou lesquels des pouvoirs du bureau de conciliation qu'énumèrent les alinéas 22*b*) à *e*) et faire à ce sujet rapport au bureau de conciliation. 1966-67, c. 72, art. 85.

Rapport

Rapport au Président

86. (1) Un bureau de conciliation doit, dans les quatorze jours qui suivent la réception par lui du relevé visé à l'article 83 ou dans tel délai plus long dont peuvent convenir les parties ou qui peut être fixé par le Président, communiquer ses conclusions et ses recommandations au Président.

Ne doit pas nécessiter une mesure législative

(2) Le paragraphe 56(2) s'applique, *mutatis mutandis*, relativement à une recommandation d'un rapport d'un bureau de conciliation.

Questions exclues du rapport

(3) Aucun rapport d'un bureau de conciliation ne doit contenir de recommandation concernant les normes, les procédures ou les

the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees.

Reconsideration of matters contained in report

(4) After a conciliation board has reported to the Chairman its findings and recommendations on the matters set forth in the statement referred to in section 83, the Chairman may direct it to reconsider and clarify or amplify its report or any part thereof, or to consider and report on any matter added to such statement pursuant to that section, except that in any such case the report of the conciliation board shall be deemed to have been received by the Chairman notwithstanding that the reconsidered report or the report on the added matter, as the case may be, has not been received by him. 1966-67, c. 72, s. 86.

Copy of report to be sent to parties

87. On receipt of the report of a conciliation board, the Chairman shall forthwith cause a copy thereof to be sent to the parties and may cause the report to be published in such manner as he sees fit. 1966-67, c. 72, s. 87.

Report as evidence

88. No report of a conciliation board, and no testimony or proceedings before a conciliation board, are receivable in evidence in any court in Canada except in the case of a prosecution for perjury. 1966-67, c. 72, s. 88.

Binding effect

89. Where at any time before a conciliation board has made its report the parties so agree in writing, a recommendation made by a conciliation board is binding on the parties, subject to and for the purposes of this Act, and shall be given effect to accordingly. 1966-67, c. 72, s. 89.

PART IV

GRIEVANCES

Right to Present Grievances

Right of employee

90. (1) Where any employee feels himself to be aggrieved

(*a*) by the interpretation or application in respect of him of

(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award; or

(*b*) as a result of any occurrence or matter affecting his terms and conditions of employment, other than a provision described in subparagraph (*a*)(i) or (ii),

in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, he is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

Limitation

(2) An employee is not entitled to present any grievance relating to the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award unless he has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies, or any grievance relating to any

méthodes régissant la nomination, l'appréciation, l'avancement, la rétrogradation, le transfert, la mise en disponibilité ou le congédiement des employés.

Nouvel examen des questions contenues dans le rapport

(4) Après qu'un bureau de conciliation a communiqué au Président ses conclusions et ses recommandations sur les questions énumérées dans le relevé mentionné à l'article 83, le Président peut lui ordonner d'examiner à nouveau et d'élucider ou de développer l'ensemble ou une partie de son rapport, ou d'examiner toute question ajoutée à ce relevé comme le prévoit ledit article et de présenter un rapport à cet égard. Toutefois, en ces circonstances, le Président est réputé avoir reçu le rapport du bureau de conciliation même s'il n'a pas reçu le rapport reconsidéré ou le rapport visant la question complémentaire, selon le cas. 1966-67, c. 72, art. 86.

La copie du rapport doit être adressée aux parties

87. Dès la réception du rapport d'un bureau de conciliation, le Président doit immédiatement en faire adresser une copie aux parties et peut faire publier le rapport de la manière qu'il estime appropriée. 1966-67, c. 72, art. 87.

Force probante du rapport

88. Aucun rapport d'un bureau de conciliation ni aucun témoignage recueilli ni aucune procédure intervenue devant un bureau de conciliation ne sont recevables à titre de preuve devant les tribunaux du Canada, sauf en cas de poursuite pour parjure. 1966-67, c. 72, art. 88.

Effet obligatoire sur accord des parties

89. Lorsque, avant qu'un bureau de conciliation ait fait son rapport, les parties en conviennent par écrit, une recommandation faite par un bureau de conciliation lie les parties sous réserve et aux fins de la présente loi, et il doit y être donné suite en conséquence. 1966-67, c. 72, art. 89.

PARTIE IV

GRIEFS

Droit d'exposer des griefs

Les employés ont le droit d'exposer des griefs

90. (1) Lorsqu'un employé s'estime lésé

a) par l'interprétation ou l'application à son égard

(i) de quelque disposition d'une loi, d'un règlement, d'une instruction ou d'un autre instrument établi ou émis par l'employeur, concernant des conditions d'emploi, ou

(ii) d'une disposition d'une convention collective ou d'une décision arbitrale; ou

b) par suite d'un événement ou d'une question qui vise ses conditions d'emploi, sauf une disposition indiquée au sous-alinéa *a*)(i) ou (ii),

relativement à laquelle ou auquel aucune procédure administrative de réparation n'est prévue en vertu d'une loi du Parlement, il a le droit, sous réserve du paragraphe (2), de présenter ce grief à chacun des paliers, y compris le dernier palier, que prévoit la procédure applicable aux griefs établie par la présente loi.

Limitation

(2) Un employé n'a droit de présenter ni un grief relatif à l'interprétation ou à l'application à son égard d'une disposition d'une convention collective ou d'une décision arbitrale sauf s'il a l'approbation de l'agent négociateur de l'unité de négociation à laquelle s'applique la convention collective ou la décision arbitrale et s'il est représenté par cet agent négociateur, ni un

action taken pursuant to an instruction, direction or regulation given or made as described in section 112.

Right to be represented by employee organization

(3) An employee who is not included in a bargaining unit for which an employee organization has been certified as bargaining agent may seek the assistance of and, if he chooses, may be represented by any employee organization in the presentation or reference to adjudication of a grievance.

Idem

(4) No employee who is included in a bargaining unit for which an employee organization has been certified as bargaining agent may be represented by any employee organization, other than the employee organization certified as such bargaining agent, in the presentation or reference to adjudication of a grievance. 1966-67, c. 72, s. 90.

Adjudication of Grievances

Reference to Adjudication

Reference of grievance to adjudication

91. (1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to

(*a*) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or

(*b*) disciplinary action resulting in discharge, suspension or a financial penalty,

and his grievance has not been dealt with to his satisfaction, he may refer the grievance to adjudication.

Approval of bargaining agent

(2) Where a grievance that may be presented by an employee to adjudication is a grievance relating to the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies signifies in prescribed manner

(*a*) its approval of the reference of the grievance to adjudication; and

(*b*) its willingness to represent the employee in the adjudication proceedings. 1966-67, c. 72, s. 91.

Appointment of Adjudicators

Members to adjudicate

92. The Board shall assign such members as may be required to hear and adjudicate upon grievances referred to adjudication under this Act. R.S., c. P-35, s. 92; 1974-75-76, c. 67, s. 24.

Establishment of a Board of Adjudication

Composition of board of adjudication

93. Where a grievance is referred to a board of adjudication, the board shall be composed of three persons, namely,

(*a*) a member of the Board, who shall be the chairman;

(*b*) one person nominated by one party; and

(*c*) one person nominated by the other party;

but no person is eligible to be a member of the board of adjudication so established if he has any direct interest in or in connection with the

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grief relatif à quelque mesure prise en vertu d'une instruction, directive ou règlement édicté selon l'article 112.

Droit d'être représenté par une association d'employés

(3) Un employé qui ne fait pas partie d'une unité de négociation pour laquelle une association d'employés a été accréditée à titre d'agent négociateur peut demander l'aide de n'importe quelle association d'employés et, si tel est son choix, il peut être représenté par toute association d'employés, à l'occasion de la présentation d'un grief ou de son renvoi à l'arbitrage.

Idem

(4) Aucun employé faisant partie d'une unité de négociation pour laquelle une association d'employés a été accréditée à titre d'agent négociateur ne peut être représenté par une association d'employés autre que celle qui est ainsi accréditée à titre d'agent négociateur, à l'occasion de la présentation d'un grief ou de son renvoi à l'arbitrage. 1966-67, c. 72, art. 90.

Arbitrage des griefs

Renvoi à l'arbitrage

Renvoi d'un grief à l'arbitrage

91. (1) Lorsqu'un employé a présenté un grief jusqu'au dernier palier de la procédure applicable aux griefs inclusivement, au sujet

a) de l'interprétation ou de l'application, en ce qui le concerne, d'une disposition d'une convention collective ou d'une décision arbitrale, ou

b) d'une mesure disciplinaire entraînant le congédiement, la suspension ou une peine pécuniaire,

et que son grief n'a pas été réglé d'une manière satisfaisante pour lui, il peut renvoyer le grief à l'arbitrage.

Approbation par l'agent négociateur

(2) Lorsqu'un grief qui peut être présenté par un employé à l'arbitrage est un grief relatif à l'interprétation ou l'application, en ce qui le concerne, d'une disposition d'une convention collective ou d'une décision arbitrale, l'employé n'a pas le droit de renvoyer le grief à l'arbitrage à moins que l'agent négociateur de l'unité de négociation à laquelle s'applique la convention collective ou la décision arbitrale ne signifie de la manière prescrite

a) son approbation du renvoi du grief à l'arbitrage; et

b) son acceptation de représenter l'employé dans les procédures d'arbitrage. 1966-67, c. 72, art. 91.

Nomination des arbitres

Les membres tranchent les griefs

92. La Commission affecte les membres en nombre suffisant pour entendre et trancher les griefs renvoyés à l'arbitrage en vertu de la présente loi. S.R., c. P-35, art. 92; 1974-75-76, c. 67, art. 24.

Institution d'un conseil d'arbitrage

Composition d'un conseil d'arbitrage

93. Un conseil d'arbitrage auquel un grief est renvoyé doit se composer de trois personnes, savoir:

a) un membre, de la Commission qui assumera la présidence,

b) une personne choisie par l'une des parties, et

c) une personne choisie par l'autre partie,

mais nul ne peut être membre d'un conseil d'arbitrage ainsi constitué s'il a quelque intérêt grievance, its handling or its disposition. R.S., c. P-35, s. 93; 1974-75-76, c. 67, s. 25.

Duty of the Board

Notice to specify whether adjudicator named, etc.

94. (1) Where a grievance has been referred to adjudication, the aggrieved employee shall, in the manner prescribed, notify the Board and shall specify in the notice whether an adjudicator is named in any applicable collective agreement or, if no such adjudicator is named, whether he requests the establishment of a board of adjudication.

Action to be taken by Board

(2) Where a grievance has been referred to adjudication and the aggrieved employee has notified the Board as required by subsection (1), the Board shall, in the manner and within the time prescribed,

(*a*) where the grievance is one arising out of a collective agreement and an adjudicator is named therein, refer the matter to the adjudicator so named;

(*b*) where the establishment of a board of adjudication has been requested by the aggrieved employee and no objection thereto has been made by the employer within such time as may be prescribed, establish such a board and refer the matter to it; and

(*c*) in any other case, refer the matter to an adjudicator selected by it. R.S., c. P-35, s. 94; 1974-75-76, c. 67, s. 26.

Jurisdiction of Adjudicator

Compliance with procedures

95. (1) Subject to any regulation made by the Board under paragraph 99(1)(*d*), no grievance shall be referred to adjudication and no adjudicator shall hear or render a decision on a grievance until all procedures established for the presenting of the grievance up to and including the final level in the grievance process have been complied with.

Decision requiring amendment

(2) No adjudicator shall, in respect of any grievance, render any decision thereon the effect of which would be to require the amendment of a collective agreement or an arbitral award.

Binding effect

(3) Where

(*a*) a grievance has been presented up to and including the final level in the grievance process, and

(*b*) the grievance is not one that under section 91 may be referred to adjudication,

the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken thereon. 1966-67, c. 72, s. 95.

Decision of Adjudicator

Hearing of grievance

96. (1) Where a grievance is referred to adjudication, the adjudicator shall give both parties to the grievance an opportunity of being heard.

Decision on grievance

(2) After considering the grievance, the adjudicator shall render a decision thereon and

(*a*) send a copy thereof to each party and his or its representative, and to the bargaining agent, if any, for the bargaining unit to

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direct inhérent ou corrélatif au grief, à son instruction ou à son règlement. S.R., c. P-35, art. 93; 1974-75-76, c. 67, art. 25.

Fonction de la Commission

Avis indiquant si un arbitre est nommé, etc.

94. (1) Lorsqu'un grief a été renvoyé à l'arbitrage, l'employé qui s'estime lésé doit, de la manière prescrite, en informer la Commission. Il doit indiquer dans l'avis si un arbitre est nommé dans une convention collective applicable ou, lorsque aucun arbitre n'est nommé, s'il demande la constitution d'un conseil d'arbitrage.

Mesures à prendre par la Commission

(2) Lorsqu'un grief a été renvoyé à l'arbitrage et que l'employé qui s'estime lésé en a informé la Commission comme l'exige le paragraphe (1), la Commission doit, de la manière et dans le délai prescrits,

a) lorsque le grief découle d'une convention collective dans laquelle un arbitre est nommé, renvoyer l'affaire devant l'arbitre ainsi nommé;

b) lorsque la constitution d'un conseil d'arbitrage a été demandée par l'employé qui s'estime lésé et que l'employeur n'y a fait aucune objection dans le délai qui peut être prescrit, constituer un tel conseil et y renvoyer l'affaire; et

c) dans tout autre cas, renvoyer l'affaire devant un arbitre choisi par elle. S.R., c. P-35, art. 94; 1974-75-76, c. 67, art. 26.

Compétence de l'arbitre

Observation des procédures

95. (1) Sous réserve de tout règlement établi par la Commission aux termes de l'alinéa 99(1)*d*), aucun grief ne doit être renvoyé à l'arbitrage et aucun arbitre ne doit entendre un grief ni rendre une décision à son sujet avant que toutes les procédures établies pour la présentation du grief jusqu'au dernier palier de la procédure applicable aux griefs inclusivement aient été observées.

Décision nécessitant une modification

(2) Un arbitre ne doit pas, relativement à un grief, rendre une décision qui aurait pour effet d'exiger la modification d'une convention collective ou d'une décision arbitrale.

Décision définitive

(3) Lorsque

a) la présentation d'un grief a atteint le dernier palier de la procédure applicable aux griefs inclusivement, et que

b) le grief n'est pas un grief qui, aux termes de l'article 91, peut être renvoyé à l'arbitrage,

la décision relative au grief prise au dernier palier de la procédure applicable aux griefs est définitive et obligatoire à toutes fins de la présente loi et le grief ne peut faire l'objet d'aucune autre mesure en vertu de la présente loi. 1966-67, c. 72, art. 95.

Décision de l'arbitre

Audition du grief

96. (1) Lorsqu'un grief est renvoyé à l'arbitrage, l'arbitre doit donner aux deux parties au grief l'occasion d'être entendues.

Décision au sujet d'un grief

(2) Après avoir étudié le grief, l'arbitre doit rendre une décision à son sujet et

a) en faire parvenir copie à chaque partie et à son représentant ainsi qu'à l'agent négociateur, s'il en est, pour l'unité de négociation à which the employee whose grievance it is belongs; and

(*b*) deposit a copy of the decision with the Secretary of the Board.

Decision of board of adjudication

(3) In the case of a board of adjudication, a decision of the majority of the members on a grievance is a decision of the board thereon, and the decision shall be signed by the chairman of the board.

Implementation of decision by employer

(4) Where a decision on any grievance referred to adjudication requires any action by or on the part of the employer, the employer shall take such action.

Action to be taken by employee or bargaining agent

(5) Where a decision on any grievance requires any action by or on the part of an employee or a bargaining agent or both of them, the employee or bargaining agent, or both, as the case may be, shall take such action.

Powers of Board with respect to decisions on grievances

(6) The Board may, in accordance with section 20, take such action as is contemplated by that section to give effect to the decision of an adjudicator on a grievance but shall not inquire into the basis or substance of the decision. 1966-67, c. 72, s. 96.

Expenses of Adjudication

Where adjudicator named in collective agreement

97. (1) Where an adjudicator is named in a collective agreement, the method of determining his remuneration and of defraying such expenses as he may incur shall be as established in the collective agreement naming the adjudicator, but if the agreement does not specify such method, the named adjudicator's remuneration and his expenses shall be borne equally by the parties.

Where no adjudicator named in agreement

(2) Where a grievance is referred to adjudication but is not referred to an adjudicator named in a collective agreement, and the employee whose grievance it is, is represented in the adjudication proceedings by the bargaining agent for the bargaining unit to which the employee belongs, the bargaining agent is liable to pay and shall remit to the Board such part of the costs of the adjudication as may be determined by the Secretary of the Board with the approval of the Board, except that where the grievance is referred to a board of adjudication, the remuneration and expenses of the nominee of each party shall be borne by such party respectively.

Recovery

(3) Any amount that by subsection (2) is payable to the Board by a bargaining agent may be recovered as a debt due to the Crown by the bargaining agent which shall, for the purposes of this subsection, be deemed to be a person. 1966-67, c. 72, s. 97.

Enforcement of Obligations of Employer and Employee Organizations

Reference by employer or bargaining agent to chief adjudicator

98. (1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and

(*a*) the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the collective agreement or arbitral award, and

(*b*) the obligation, if any, is not an obligation the enforcement of which may be the subject of a grievance of an employee in the

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laquelle appartient l'employé qui a présenté le grief, et

b) remettre une copie de la décision au secrétaire de la Commission.

Décision du conseil d'arbitrage

(3) Dans le cas d'un conseil d'arbitrage, une décision de la majorité des membres au sujet d'un grief constitue une décision du conseil à ce sujet. Le président du conseil doit signer cette décision.

Mise en œuvre de la décision par l'employeur

(4) Lorsqu'une décision au sujet d'un grief renvoyé à l'arbitrage exige qu'une mesure soit prise par l'employeur ou de sa part, l'employeur doit prendre cette mesure.

Mesure à prendre par l'employé ou l'agent négociateur

(5) Lorsqu'une décision au sujet d'un grief exige qu'une mesure soit prise par l'employé, par un agent négociateur ou par les deux, ou de leur part, l'employé ou l'agent négociateur, ou les deux, selon le cas, doivent prendre cette mesure.

Pouvoirs de la Commission relativement à une décision au sujet d'un grief

(6) La Commission peut, en conformité de l'article 20, prendre toute mesure prévue par cet article pour donner effet à la décision d'un arbitre au sujet d'un grief. Toutefois, elle ne doit pas discuter le fondement ou la substance de la décision. 1966-67, c. 72, art. 96.

Frais d'arbitrage

Cas où un arbitre est nommé dans une convention collective

97. (1) Lorsqu'un arbitre est nommé dans une convention collective, cette convention doit prévoir la méthode selon laquelle ses frais de rémunération et selon laquelle sont payés les frais qu'il peut encourir. Toutefois, si elle ne précise pas de méthode, les parties supportent à parts égales la rémunération de l'arbitre nommé et ses frais.

Cas où il n'y a pas d'arbitre nommé dans une convention collective

(2) Lorsqu'un grief est renvoyé à l'arbitrage mais n'est pas renvoyé à un arbitre nommé dans une convention collective, et que l'employé qui a soumis le grief est représenté dans les procédures d'arbitrage par l'agent négociateur pour l'unité de négociation à laquelle l'employé appartient, l'agent négociateur est tenu de payer et doit remettre à la Commission la partie des frais de l'arbitrage que peut, avec l'approbation de la Commission, déterminer le secrétaire de la Commission. Toutefois, si le grief est renvoyé à un conseil d'arbitrage, la rémunération et les dépenses des arbitres sont à la charge des parties qui les ont respectivement nommés.

Recouvrement

(3) Tout montant qui, aux termes du paragraphe (2) est payable à la Commission par un agent négociateur peut être recouvré comme une dette due à la Couronne par l'agent négociateur qui est, aux fins du présent paragraphe, réputé une personne. 1966-67, c. 72, art. 97.

Exécution des obligations de l'employeur et des associations d'employés

Renvoi devant l'arbitre en chef effectué par l'employeur ou par l'agent négociateur

98. (1) Lorsque l'employeur et un agent négociateur ont signé une convention collective ou sont liés par une décision arbitrale et

a) que l'employeur ou l'agent négociateur cherche à faire exécuter une obligation qu'on prétend découler de la convention collective ou de la décision arbitrale, et

b) que l'obligation, s'il en est, n'est pas une obligation dont l'exécution peut faire l'objet d'un grief d'un employé de l'unité de négobargaining unit to which the collective agreement or arbitral award applies,

either the employer or the bargaining agent may, in the prescribed manner, refer the matter to the Board, which shall hear and determine whether there is an obligation as alleged and whether, if there is, there has been a failure to observe or to carry out the obligation.

Hearing and determination of reference

(2) The Board shall hear and determine any matter referred to it pursuant to subsection (1) as though the matter were a grievance, and subsection 95(2) and sections 96 and 97 apply to the hearing and determination of that matter. R.S., c. P-35, s. 98; 1974-75-76, c. 67, s. 27.

Regulations respecting Grievances

Regulations re procedures for presentation of grievances

99. (1) The Board may make regulations in relation to the procedure for the presenting of grievances, including regulations respecting

(*a*) the manner and form of presenting a grievance;

(*b*) the maximum number of levels of officers of the employer to whom grievances may be presented;

(*c*) the time within which a grievance may be presented up to any level in the grievance process including the final level;

(*d*) the circumstances in which any level below the final level in the grievance process may be eliminated; and

(*e*) in any case of doubt, the circumstances in which any occurrence or matter may be said to constitute a grievance.

Application of regulations

(2) Any regulations made by the Board under subsection (1) in relation to the procedure for the presentation of grievances shall not apply in respect of employees included in a bargaining unit for which a bargaining agent has been certified by the Board, to the extent that such regulations are inconsistent with any provisions contained in a collective agreement entered into by the bargaining agent and the employer applicable to those employees.

Regulations re adjudication of grievances

(3) The Board may make regulations in relation to the adjudication of grievances, including regulations respecting

(*a*) the manner in which and the time within which a grievance may be referred to adjudication after it has been presented up to and including the final level in the grievance process;

(*b*) the manner in which and the time within which boards of adjudication are to be established;

(*c*) the procedure to be followed by adjudicators; and

(*d*) the form of decisions rendered by adjudicators.

Employer to designate persons at final or any level

(4) For the purposes of any provision of this Act respecting grievances, the employer shall designate the person whose decision on a grievance constitutes the final or any level in the grievance process and the employer shall, in any case of doubt, by notice in writing advise any person wishing to present a grievance, or the Board, of the person whose decision thereon constitutes the final or any level in such process. R.S., c. P-35, s. 99; 1974-75-76, c. 67, s. 28.

ciation visée par la convention collective ou la décision arbitrale,

l'employeur ou l'agent négociateur peut, de la manière prescrite, renvoyer l'affaire à la Commission qui doit l'entendre et décider si l'obligation alléguée existe et, dans l'affirmative, s'il y a eu inobservation ou inexécution.

Audition et règlement d'une affaire renvoyée

(2) La Commission doit entendre et trancher l'affaire qui lui est ainsi renvoyée en conformité du paragraphe (1) comme s'il s'agissait d'un grief, et le paragraphe 95(2) ainsi que les articles 96 et 97 s'appliquent à son audition et à la décision à rendre en l'espèce. S.R., c. P-35, art. 98; 1974-75-76, c. 67, art. 27.

Règlements concernant les griefs

Règlements visant la procédure de présentation des griefs

99. (1) La Commission peut établir des règlements relatifs à la procédure à suivre pour la présentation des griefs et, notamment, en ce qui concerne

a) le mode et les formules de présentation d'un grief;

b) le nombre maximum de paliers administratifs de l'employeur au niveau desquels des griefs peuvent être présentés;

c) le délai pendant lequel un grief peut être présenté à tout palier de la procédure applicable aux griefs, y compris le dernier palier;

d) les circonstances dans lesquelles tout palier inférieur au dernier palier de la procédure applicable aux griefs peut être éliminé; et

e) en cas de doute, les circonstances dans lesquelles un événement ou une question quelconque peuvent être considérés comme constituant un grief.

Champ d'application des règlements

(2) Les règlements établis par la Commission en vertu du paragraphe (1) relativement à la procédure à suivre pour la présentation des griefs ne s'appliquent pas aux employés compris dans une unité de négociation pour laquelle un agent négociateur a été accrédité par la Commission, dans la mesure où de tels règlements sont incompatibles avec des dispositions que renferme une convention collective conclue par l'agent négociateur et l'employeur, applicable à ces employés.

Règlements visant l'arbitrage des griefs

(3) La Commission peut établir des règlements relatifs à l'arbitrage des griefs et, notamment, en ce qui concerne

a) la manière selon laquelle et le délai dans lequel un grief peut être renvoyé à l'arbitrage après qu'il a été présenté jusqu'au dernier palier inclusivement, de la procédure applicable aux griefs;

b) la manière selon laquelle et le délai dans lequel des conseils d'arbitrage doivent être établis;

c) la procédure que doivent suivre les arbitres; et

d) la forme des décisions rendues par les arbitres.

L'employeur doit désigner des personnes au dernier palier et à tout autre palier

(4) Pour l'application de toute disposition de la présente loi concernant les griefs, l'employeur doit désigner la personne dont la décision sur un grief constitue le dernier palier ou un palier de la procédure applicable aux griefs. L'employeur doit, en cas de doute, au moyen d'un avis écrit, faire connaître, à toute personne désirant présenter un grief ou à la Commission, quelle est la personne dont la décision en l'espèce constitue le dernier palier ou un palier de cette procédure. S.R., c. P-35, art. 99; 1974-75-76, c. 67, art. 28.

PART V

GENERAL

Review of Orders

Orders not subject to review by court

100. (1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitrator appointed under section 62 or an adjudicator is final and shall not be questioned or reviewed in any court.

No review by injunction, etc.

(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain the Board, an arbitrator appointed under section 62 or an adjudicator in any of its or his proceedings. R.S., c. P-35, s. 100; 1974-75-76, c. 67, s. 29.

Rights and Prohibitions relating to Strikes

Participation by employees in strike

101. (1) No employee shall participate in a strike

(*a*) who is not included in a bargaining unit for which a bargaining agent has been certified by the Board,

(*b*) who is included in a bargaining unit for which the process for resolution of a dispute is by the referral thereof to arbitration, or

(*c*) who is a designated employee.

Idem

(2) No employee who is not an employee described in subsection (1) shall participate in a strike

(*a*) where a collective agreement applying to the bargaining unit in which he is included is in force, or

(*b*) where no collective agreement applying to the bargaining unit in which he is included is in force, unless

(i) a conciliation board for the investigation and conciliation of a dispute in respect of that bargaining unit has been established and seven days have elapsed from the receipt by the Chairman of the report of the conciliation board, or

(ii) a request for the establishment of a conciliation board for the investigation and conciliation of a dispute in respect of that bargaining unit has been made in accordance with this Act and the Chairman has notified the parties pursuant to section 78 of his intention not to establish such a board. 1966-67, c. 72, s. 101.

Declaration or authorization of strike

102. No employee organization shall declare or authorize a strike of employees, and no officer or representative of an employee organization shall counsel or procure the declaration or authorization of a strike of employees or the participation of employees in a strike, the effect of which is or would be to involve the participation of an employee in a strike in contravention of section 101. 1966-67, c. 72, s. 102.

Application for declaration of strike as unlawful

103. (1) Where it is alleged by the employer that an employee organization has declared or authorized a strike of employees, the effect of

PARTIE V

DISPOSITIONS GÉNÉRALES

Examen des ordonnances

100. (1) Sous réserve de la présente loi, toute ordonnance, décision arbitrale, directive, décision ou déclaration de la Commission, d'un arbitre spécial nommé en vertu de l'article 62 ou d'un arbitre est définitive et ne peut être ni remise en question ni examinée devant un tribunal.

Les ordonnances ne peuvent faire l'objet d'une révision par un tribunal

(2) Il ne doit être pris aucune ordonnance ni aucun moyen de contrainte, et il ne doit, devant aucun tribunal, être entamé de procédures, sous forme d'injonction, de *certiorari*, de prohibition, de *quo warranto* ou autrement, pour contester, examiner, rejeter ou restreindre la compétence de la Commission, d'un arbitre spécial nommé en vertu de l'article 62 ou d'un arbitre dans l'une quelconque de ses délibérations. S.R., c. P-35, art. 100; 1974-75-76, c. 67, art. 29.

Pas de révision par injonction, etc.

Droits et interdictions concernant les grèves

101. (1) Ne doit participer à une grève aucun employé

Participation de l'employé à une grève

a) qui ne fait pas partie d'une unité de négociation pour laquelle un agent négociateur a été accrédité par la Commission,

b) qui appartient à une unité de négociation à l'égard de laquelle la méthode de règlement d'un différend est le renvoi du différend à l'arbitrage, ou

c) qui est un employé désigné.

(2) Aucun employé qui n'est pas un employé décrit au paragraphe (1) ne peut participer à une grève

Idem

a) lorsqu'une convention collective s'appliquant à l'unité de négociation dont il fait partie est en vigueur, ou

b) lorsque aucune convention collective s'appliquant à l'unité de négociation dont il fait partie n'est en vigueur, à moins que

(i) un bureau de conciliation chargé de l'enquête et de la conciliation du différend relativement à cette unité de négociation ait été établi et que sept jours se soient écoulés depuis la réception par le Président du rapport du bureau de conciliation, ou que

(ii) une demande en vue de l'établissement d'un bureau de conciliation chargé de l'enquête et de la conciliation d'un différend relativement à cette unité de négociation ait été faite en conformité de la présente loi et que le Président ait notifié aux parties, conformément à l'article 78, son intention de ne pas établir un tel bureau. 1966-67, c. 72, art. 101.

102. Une association d'employés ne doit ni déclarer ni autoriser une grève des employés, ni aucun dirigeant ou représentant d'une association d'employés ne doit recommander ni provoquer la déclaration ou l'autorisation d'une grève des employés, ni leur participation à une telle grève, qui a ou aurait pour effet d'entraîner la participation d'un employé à une grève en contravention de l'article 101. 1966-67, c. 72, art. 102.

Déclaration ou autorisation de la grève

103. (1) Lorsque l'employeur prétend qu'une association d'employés a déclaré ou autorisé une grève d'employés qui a ou aurait pour effet

Demande de déclaration d'illégalité de la grève which is or would be to involve the participation of an employee in a strike in contravention of section 101, the employer may apply to the Board, for a declaration that the strike is or would be unlawful and the Board, after affording an opportunity to the employee organization to be heard on the application, may make such a declaration.

Application for declaration of strike as lawful

(2) Where it is alleged by a bargaining agent for a bargaining unit that the participation of employees included in the bargaining unit in a strike authorized or declared, or proposed to be authorized or declared, by the bargaining agent is not or would not be in contravention of section 101, the bargaining agent may apply to the Board for a declaration that the strike is or would be lawful and the Board, after affording an opportunity to the employer to be heard on the application, may make such a declaration. 1966-67, c. 72, s. 103.

Offences and punishment

104. (1) Every employee who contravenes section 101 is guilty of an offence and liable on summary conviction to a fine not exceeding one hundred dollars.

Idem

(2) Every officer or representative of an employee organization who contravenes section 102 is guilty of an offence and liable on summary conviction to a fine not exceeding three hundred dollars.

Idem

(3) Every employee organization that contravenes section 102 is guilty of an offence and liable on summary conviction to a fine not exceeding one hundred and fifty dollars for each day that any strike declared or authorized by it in contravention of that section is or continues in effect. 1966-67, c. 72, s. 104.

Prosecution of employee organization

105. A prosecution for an offence under section 104 may be brought against an employee organization and in the name of that organization, and for the purposes of any such prosecution an employee organization shall be deemed to be a person, and any act or thing done or omitted by an officer or representative of an employee organization within the scope of his authority to act on behalf of the employee organization shall be deemed to be an act or thing done or omitted by the employee organization. 1966-67, c. 72, s. 105.

Consent to Prosecution

Consent

106. No prosecution arising out of an alleged failure by any person to observe any prohibition contained in section 8, 9 or 10 and no prosecution for an offence under section 104 shall be instituted except with the consent of the Board. 1966-67, c. 72, s. 106.

Protection of Members and Staff

Evidence respecting information obtained

107. No member of the Board or of a conciliation board and no adjudicator, conciliator or officer or employee of or person appointed by the Board and no arbitrator appointed under section 62 shall be required to give evidence in any civil action, suit or other proceeding respecting information obtained in the discharge of his duties under this Act. R.S., c. P-35, s. 107; 1974-75-76, c. 67, s. 30.

d'entraîner la participation d'un employé à la grève en contravention de l'article 101, l'employeur peut demander à la Commission de déclarer que la grève est ou serait illégale. La Commission, après avoir donné l'occasion à l'association d'employés d'être entendue sur la demande, peut faire une telle déclaration.

Demande de déclaration de légalité de la grève

(2) Lorsqu'un agent négociateur d'une unité de négociation prétend que la participation d'employés qui font partie de l'unité de négociation à une grève qu'il a autorisée ou déclarée, ou qu'il se propose d'autoriser ou de déclarer, n'est pas ou ne serait pas faite en contravention de l'article 101, il peut demander à la Commission de déclarer que la grève est ou serait légale. La Commission, après avoir donné l'occasion à l'employeur d'être entendu sur la demande, peut faire une telle déclaration. 1966-67, c. 72, art. 103.

Infraction et peine

104. (1) Tout employé qui contrevient à l'article 101 est coupable d'une infraction et passible sur déclaration sommaire de culpabilité d'une amende d'au plus cent dollars.

Idem

(2) Tout dirigeant ou représentant d'une association d'employés qui contrevient à l'article 102 est coupable d'une infraction et passible sur déclaration sommaire de culpabilité d'une amende d'au plus trois cents dollars.

Idem

(3) Toute association d'employés qui contrevient à l'article 102 est coupable d'une infraction et passible sur déclaration sommaire de culpabilité d'une amende d'au plus cent cinquante dollars pour chaque jour pendant lequel une grève déclarée ou autorisée par elle en contravention dudit article dure ou se prolonge. 1966-67, c. 72, art. 104.

Poursuite d'une association d'employés

105. La poursuite d'une infraction aux termes de l'article 104 peut être intentée contre une association d'employés et au nom de cette association et, aux fins d'une telle poursuite, une association d'employés est réputée une personne, et toute chose ou tout acte faits ou omis par un dirigeant ou un représentant d'une association d'employés dans les limites de son autorisation d'agir au nom de l'association d'employés sont réputés une chose ou un acte faits ou omis par l'association d'employés. 1966-67, c. 72, art. 105.

Autorisation des poursuites

Consentement

106. Sans le consentement de la Commission, il ne peut être intenté aucune poursuite fondée sur le prétendu manquement de qui que ce soit dans l'observation d'une interdiction contenue dans les articles 8, 9 ou 10 ni aucune poursuite pour une infraction prévue à l'article 104. 1966-67, c. 72, art. 106.

Immunité des membres et du personnel

Preuve concernant les renseignements obtenus

107. Les membres de la Commission, ou d'un bureau de conciliation, les arbitres, conciliateurs, fonctionnaires ou employés de la Commission, des personnes qu'elle nomme et les arbitres spéciaux nommés en vertu de l'article 62 ne sont pas tenus de faire une déposition dans une action, instance ou autre procédure civile concernant des renseignements obtenus dans l'accomplissement de leurs fonctions aux termes de la présente loi. S.R., c. P-35, art. 107; 1974-75-76, c. 67, art. 30.

Witness Fees

Payment of witness fees

108. A person who is summoned by the Board, an arbitrator appointed under section 62 or a conciliation board to attend as a witness in any proceedings thereof taken pursuant to this Act and who so attends is entitled to be paid an allowance for expenses determined in accordance with the scale for the time being in force with respect to witnesses in civil suits in the superior court of the province in which such proceedings are being taken. R.S., c. P-35, s. 108; 1974-75-76, c. 67, s. 30.

Oaths and Affirmations

Oath or affirmation to be taken

109. A person appointed under this Act shall, before entering upon his duties, take an oath or affirmation in the form prescribed in Schedule IV before any person authorized by the Governor in Council to take such oath or affirmation. 1966-67, c. 72, s. 109.

Provision of Facilities and Staff

Facilities and staff

110. The Board shall provide an arbitrator appointed under section 62, a conciliation board and an adjudicator with quarters and staff and such other facilities as are necessary to enable it or him to carry out its or his functions under this Act. R.S., c. P-35, s. 110; 1974-75-76, c. 67, s. 31.

Superannuation

Application of Public Service Superannuation Act

111. Unless the Governor in Council otherwise orders in any case or class of cases, a person appointed under this Act shall be deemed not to be employed in the Public Service for the purposes of the *Public Service Superannuation Act*. 1966-67, c. 72, s. 111.

Saving Provision

Limitation

112. (1) Nothing in this or any other Act shall be construed to require the employer to do or refrain from doing anything contrary to any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Order to be conclusive proof

(2) For the purposes of subsection (1), any order made by the Governor in Council is conclusive proof of the matters stated therein in relation to the giving or making of any instruction, direction or regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada. 1966-67, c. 72, s. 112.

113. [Repealed 1972, c. 18, s. 4.]

Financial

Expenditures

114. All expenditures required for the purposes of this Act shall, unless otherwise specifically provided for, be paid out of money appropriated by Parliament therefor. 1966-67, c. 72, s. 114.

Report to Parliament

Annual report to Parliament

115. As soon as possible after the end of each year, the Board shall prepare and submit to such Minister of the Crown, other than a member of the Treasury Board, as may be

Honoraires des témoins

108. Une personne qui est assignée comme témoin par la Commission, un arbitre spécial nommé en vertu de l'article 62 ou un bureau de conciliation dans une procédure de l'un des susdits que prévoit la présente loi et qui comparaît a droit à une allocation pour frais, calculée d'après l'échelle alors en vigueur relativement aux témoins dans des poursuites civiles devant la cour supérieure de la province où ces procédures sont intentées. S.R., c. P-35, art. 108; 1974-75-76, c. 67, art. 30.

Paiement des honoraires des témoins

Serments et affirmations solennelles

109. Une personne nommée en vertu de la présente loi doit, avant d'entrer en fonctions, prêter un serment ou faire une affirmation solennelle selon la formule prescrite à l'annexe IV devant toute personne autorisée par le gouverneur en conseil pour faire prêter un tel serment ou recevoir une telle affirmation. 1966-67, c. 72, art. 109.

Serment ou affirmation solennelle

Installations et personnel

110. La Commission doit fournir aux bureaux de conciliation, aux arbitres spéciaux nommés en vertu de l'article 62 et aux arbitres les locaux, le personnel et les autres installations qui leur sont nécessaires pour leur permettre d'exercer leurs fonctions aux termes de la présente loi. S.R., c. P-35, art 110; 1974-75-76, c. 67, art. 31.

Installations et personnel

Pension

111. A moins que le gouverneur en conseil n'en ordonne autrement pour tout cas ou toute catégorie de cas, une personne nommée en vertu de la présente loi est réputée ne pas être employée dans la Fonction publique aux fins de la *Loi sur la pension du service public.* 1966-67, c. 72, art. 111.

Application de la *Loi sur la pension du service public*

Réserves

112. (1) Rien dans la présente loi ou toute autre loi ne doit s'interpréter comme enjoignant à l'employeur de faire ou de s'abstenir de faire quoi que ce soit de contraire à quelque directive ou instruction donnée ou règlement établi par le gouvernement du Canada ou pour son compte dans l'intérêt de la sûreté ou de la sécurité du Canada ou de tout État allié ou associé du Canada.

Limitation

(2) Aux fins du paragraphe (1), tout décret du gouverneur en conseil constitue une preuve péremptoire de ce qui y est énoncé au sujet de l'établissement des directives, instructions ou règlements pour le compte du gouvernement du Canada dans l'intérêt de la sûreté ou de la sécurité du Canada ou de tout État allié ou associé du Canada. 1966-67, c. 72, art. 112.

Force probante péremptoire du décret

113. [Abrogé, 1972, c. 18, art. 4.]

Dispositions financières

114. Toutes les dépenses requises aux fins de la présente loi doivent, à moins qu'il n'y soit autrement pourvu de façon particulière, être payées sur les crédits affectés par le Parlement à cette fin. 1966-67, c. 72, art. 114.

Dépenses

Rapport au Parlement

115. Aussitôt que possible après l'expiration de chaque année, la Commission doit préparer et soumettre au ministre de la Couronne, autre qu'un membre du conseil du Trésor, que peut

Rapport annuel au Parlement

designated by the Governor in Council a report on the administration of this Act during that year and that Minister shall lay the Board's report before Parliament within fifteen days after receipt thereof or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting. 1966-67, c. 72, s. 115.

SCHEDULE I

PART I

Departments and other portions of the public service of Canada in respect of which Her Majesty as represented by the Treasury Board is the employer

Departments named in Schedule A to the *Financial Administration Act*
Agricultural Stabilization Board
Anti-Inflation Appeal Tribunal
Anti-Inflation Board
Atlantic Development Board
Bureau of Pensions Advocates
Canada Employment and Immigration Commission
Canada Labour Relations Board
Canadian Dairy Commission
Canadian Grain Commission
Canadian Human Rights Commission
Canadian Intergovernmental Conference Secretariat
Canadian International Development Agency
Canadian Livestock Feed Board
Canadian Penitentiary Service
Canadian Pension Commission
Canadian Radio-television and Telecommunications Commission
Canadian Transport Commission
Defence Research Board
Director of Soldier Settlement
The Director, The Veterans' Land Act
Emergency Measures Organization
Energy Supplies Allocation Board
Federal-Provincial Relations Office
Fisheries Prices Support Board
Fisheries Research Board
Government Printing Bureau
Immigration Appeal Board
Information Canada
International Joint Commission (Canadian Section)
Maritimes Marshland Rehabilitation Administration
Ministry of State for Economic Development
Ministry of State for Science and Technology
Ministry of State for Social Development
Municipal Development and Loan Board
National Capital Commission
National Energy Board
National Library
National Museums of Canada
National Parole Board
Office of the Administrator under the *Anti-Inflation Act*
Office of the Chief Electoral Officer
Office of the Commissioner for Federal Judicial Affairs
Office of the Commissioner of Official Languages
Office of the Co-ordinator, Status of Women
Office of the Governor-General's Secretary
Office of the Representation Commissioner
Office of the Superintendent of Bankruptcy
Pension Review Board
Prairie Farm Assistance Administration
Prairie Farm Rehabilitation Administration
Privy Council Office
Public Archives
Public Service Commission
Restrictive Trade Practices Commission

désigner le gouverneur en conseil, un rapport sur l'application de la présente loi pendant l'année. Ce ministre doit présenter le rapport de la Commission au Parlement dans les quinze jours de sa réception ou, si le Parlement n'est pas alors en session, l'un des quinze premiers jours où il siège par la suite. 1966-67, c. 72, art. 115.

ANNEXE I

PARTIE I

Ministères, départements et autres éléments de la fonction publique du Canada pour lesquels Sa Majesté, représentée par le conseil du Trésor, est l'employeur

Ministères et départements mentionnés dans l'annexe A de la *Loi sur l'administration financière*
Office de stabilisation des prix agricoles
Tribunal d'appel en matière d'inflation
Commission de lutte contre l'inflation
Office d'expansion économique de la région atlantique
Bureau de services juridiques des pensions
Commission de l'emploi et de l'immigration du Canada
Conseil canadien des relations du travail
Commission canadienne du lait
Commission canadienne des grains
Commission canadienne des droits de la personne
Secrétariat des conférences intergouvernementales canadiennes
Agence canadienne de développement international
Office canadien des provendes
Service canadien des pénitenciers
Commission canadienne des pensions
Conseil de la radiodiffusion et des télécommunications canadiennes
Commission canadienne des transports
Conseil de recherches pour la défense
Directeur de l'établissement de soldats
Directeur des terres destinées aux anciens combattants
Organisation des mesures d'urgence
Office de répartition des approvisionnements d'énergie
Secrétariat des relations fédérales-provinciales
Office des prix des produits de la pêche
Office des recherches sur les pêcheries
Imprimerie de l'État
Commission d'appel de l'immigration
Information Canada
Commission mixte internationale (section canadienne)
Administration de l'utilisation des terrains marécageux des provinces maritimes
Département d'État au développement économique
Département d'État chargé du Développement social
Département d'État des Sciences et de la Technologie
Office du développement municipal et des prêts aux municipalités
Commission de la Capitale nationale
Office national de l'énergie
Bibliothèque nationale
Musées nationaux du Canada
Commission nationale des libérations conditionnelles
Bureau du Directeur en vertu de la *Loi anti-inflation*
Bureau du directeur général des élections
Bureau du Commissaire aux langues officielles
Bureau du commissaire à la magistrature fédérale
Bureau de la coordonnatrice de la situation de la femme
Secrétariat du gouverneur général
Bureau du commissaire à la représentation
Bureau du surintendant des faillites
Conseil de révision des pensions
Administration de l'assistance à l'agriculture des Prairies
Administration du rétablissement agricole des Prairies
Bureau du Conseil privé
Archives publiques

Royal Canadian Mounted Police
Staff of the Federal Court
Staff of the Supreme Court
Statistics Canada
Statute Revision Commission
Tariff Board
Tax Review Board
The Law Reform Commission of Canada
War Veterans Allowance Board

Commission de la Fonction publique
Commission d'enquête sur les pratiques restrictives du commerce
Gendarmerie royale du Canada
Personnel de la Cour fédérale
Personnel de la Cour suprême
Statistique Canada
Commission de revision des Statuts
Commission du tarif
Commission de révision de l'impôt
Commission de réforme du droit du Canada
Commission des allocations aux anciens combattants

PART II

Portions of the public service of Canada that are separate employers
Atomic Energy Control Board
Communications Security Establishment, Department of National Defence
Economic Council of Canada
Medical Research Council
National Film Board
National Research Council of Canada
Natural Sciences and Engineering Research Council
Northern Canada Power Commission
Northern Pipeline Agency
Office of the Auditor General of Canada
Public Service Staff Relations Board
Science Council of Canada
Social Sciences and Humanities Research Council
Staff of the Non-Public Funds, Canadian Forces
R.S., c. P-35, Sch. I; SOR/70-118, 477; (SOR/71-349), SOR/71-355, (360), 403; SI/72-78, 79, 85; SI/73-18, 53; SOR/73-594, 710; 1973-74, c. 52, s. 8; SOR/74-129, 430, 501; SOR/75-183; 1974-75-76, c. 16, s. 2, c. 49, s. 18, c. 75, ss. 10, 16, 29; SOR/76-242; 1976-77, c. 33, s. 67, c. 34, s. 24; SOR/78-141, 283; 1977-78, c. 20, s. 24; SOR/78-379, 627; 1978-79, c. 17, s. 8; SOR/79-294, 391; SOR/80-468

PARTIE II

Éléments de la fonction publique du Canada qui sont des employeurs distincts
Administration du pipe-line du Nord
Commission de contrôle de l'énergie atomique
Centre de la sécurité des télécommunications, ministère de la défense nationale
Conseil économique du Canada
Conseil des recherches médicales
Office national du film
Conseil national de recherches du Canada
Commission d'énergie du Nord canadien
Bureau du vérificateur général du Canada
Commission des relations de travail dans la Fonction publique
Conseil de recherches en sciences naturelles et en génie
Conseil de recherches en sciences humaines
Conseil des Sciences du Canada
Personnel des fonds non-publics, Forces canadiennes
S.R., c. P-35, annexe I; DORS/70-118, 477; (DORS/71-349), DORS/71-355, (360), 403; TR/72-78, 79, 85; TR/73-18, 53, DORS/73-594; 1973-74, c. 52, art. 8; DORS/74-129, 430, 501; DORS/75-183; 1974-75-76, c. 16, art. 2, c. 49, art. 18, c. 75, art. 10, 16, 29; DORS/76-242; 1976-77, c. 28, art. 49, c. 33, art. 67, c. 34, art. 24; DORS/78-141, 283; 1977-78, c. 20, s. 24; DORS/78-379, 627; 1978-79, c. 17, s. 8; DORS/79-294, 391, 695; DORS/80-468

SCHEDULE II

[*See* R.S.C., c. P-35, Schedule II.]

ANNEXE II

[*Voir* S.R.C., c. P-35, annexe II.]

SCHEDULE III

(Section 56)

Government Employees Compensation Act
Government Vessels Discipline Act
Public Service Employment Act
Public Service Superannuation Act
1966-67, c. 72, Sch. C.

ANNEXE III

(Article 56)

Loi sur l'indemnisation des employés de l'État
Loi sur la discipline à bord des bâtiments de l'État
Loi sur l'emploi dans la Fonction publique
Loi sur la pension de la Fonction publique
1966-67, c. 72, annexe C.

SCHEDULE IV

OATH OR AFFIRMATION OF FIDELITY

I, ..., solemnly and sincerely swear (or affirm) that I will faithfully and honestly and to the best of my skill and knowledge fulfil the duties which devolve upon me under the *Public Service Staff Relations Act* by reason of my duties as ....

1966-67, c. 72, Sch. D.

ANNEXE IV

SERMENT OU AFFIRMATION SOLENNELLE DE LOYAUTÉ

Je, ..., jure (ou affirme) solennellement et sincèrement que j'accomplirai fidèlement et honnêtement et au mieux de ma capacité et de mes connaissances, les devoirs qui m'incombent aux termes de la *Loi sur les relations de travail dans la Fonction publique* en ma qualité de ....

1966-67, c. 72, annexe D.

C-124

First Session, Thirty-second Parliament,
29-30-31 Elizabeth II, 1980-81-82

THE HOUSE OF COMMONS OF CANADA

BILL C-124

An Act respecting compensation in the public sector of Canada

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AS PASSED BY THE HOUSE OF COMMONS
AUGUST 4, 1982

C-124

Première session, trente-deuxième législature,
29-30-31 Elizabeth II, 1980-81-82

CHAMBRE DES COMMUNES DU CANADA

PROJET DE LOI C-124

Loi concernant les rémunérations dans le secteur public du Canada

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ADOPTÉ PAR LA CHAMBRE DES COMMUNES
LE 4 AOÛT 1982

1st Session, 32nd Parliament,
29-30-31 Elizabeth II, 1980-81-82

THE HOUSE OF COMMONS OF CANADA

BILL C-124

An Act respecting compensation in the public sector of Canada

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

Short title

1. This Act may be cited as the *Public Sector Compensation Restraint Act*.

PART I

INTERPRETATION

Definitions

2. (1) In this Part,

"compensation" «rémunération»

"compensation" means all forms of pay, benefits and perquisites paid or provided, directly or indirectly, by or on behalf of an employer to or for the benefit of an employee;

"compensation plan" «régime...»

"compensation plan" means the provisions, however established, for the determination and administration of compensation, and includes such provisions contained in collective agreements or arbitral awards or established bilaterally between an employer and an employee, unilaterally by an employer or by or pursuant to any Act of Parliament;

"employee" «salarié»

"employee" means any person who performs duties and functions that entitle that person to a fixed or ascertainable amount or rate of pay;

"wage rates" «taux de salaire»

"wage rates" means single rates of pay or ranges of rates of pay, including cost-of-living adjustments, or, where no such rates or ranges exist, any fixed or ascertainable amounts of pay.

Expiration of compensation plans

(2) For the purposes of this Part, where a compensation plan does not provide for an expiration date, the plan shall be deemed to expire on the day prior to the day on which wage rates under the plan would normally be revised.

1re session, 32^{e} législature,
29-30-31 Elizabeth II, 1980-81-82

CHAMBRE DES COMMUNES DU CANADA

PROJET DE LOI C-124

Loi concernant les rémunérations dans le secteur public du Canada

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, décrète :

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur les restrictions salariales du secteur public.*

PARTIE 1

DÉFINITIONS

Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente partie.

«régime de rémunération» "compensation plan"

«régime de rémunération» Ensemble de dispositions, quel que soit leur mode d'établissement, régissant la détermination et la gestion des rémunérations; constituent notamment des régimes de rémunération les dispositions de cette nature figurant dans les conventions collectives et les décisions arbitrales ou établies soit par accord entre un employeur et un salarié, soit par l'employeur seul, soit conformément à une loi du Parlement.

«rémunération» "compensation"

«rémunération» Toute forme de salaire ou de gratification versée, ou d'avantage accordé, directement ou indirectement, par un employeur ou en son nom à un salarié ou à son profit.

«salarié» "employee"

«salarié» Personne qui a droit à une rétribution ou à un taux de salaire fixe ou vérifiable pour les fonctions dont elle s'acquitte.

«taux de salaire» "wage rates"

«taux de salaire» Taux uniques de salaire ou fourchettes salariales, y compris les rajustements de coût de vie, ou, à défaut de ces taux ou fourchettes, les montants fixes ou vérifiables de salaire.

Expiration des régimes de rémunération

(2) A moins qu'il ne comporte une date d'expiration, un régime de rémunération est, pour l'application de la présente partie, réputé expirer la veille du jour où les taux de salaire qu'il prévoit seraient normalement révisés.

Wage rates and compensation plans of staff of Ministers and members of Parliament

(3) The following provisions apply, notwithstanding anything in this Part that is inconsistent therewith:

(*a*) every person referred to in paragraph 3(2) (*a*) and every research staff member of a political party that is represented in Parliament on the day this Act is assented to shall, as of the day this Act is assented to, be entitled to receive, in lieu of the wage rate to which he would, but for this paragraph, be entitled, a wage rate equal to the product of the wage rate to which that person was entitled on March 31, 1982 and one hundred and six per cent;

(*b*) wage rates in effect under paragraph (*a*) shall continue in force for the twelve month period immediately following the day this Act is assented to;

(*c*) wage rates continued in force under paragraph (*b*) shall not be increased by more than five per cent for the twelve month period immediately following the period referred to in paragraph (*b*); and

(*d*) every compensation plan to which paragraphs (*a*) to (*c*) apply shall be extended for a period of twenty-four months from the day this Act is assented to and the terms and conditions of the compensation plan, other than wages rates, shall continue in force without change for the period for which the compensation plan is extended, subject to such changes as the Treasury Board may authorize where it deems it appropriate.

APPLICATION

Application

3. (1) This Part applies to employees employed in or by

(*a*) departments or ministries of state of the Government of Canada set out in Schedule I or other portions of the public service set out therein;

(*b*) boards, commissions or corporations set out in Schedule II;

(*c*) wholly-owned subsidiaries of corporations set out in Schedule II, where the employees are employed upon or in connection with the operation of any federal work, undertaking or business within the meaning of the *Canada Labour Code*;

(*d*) the Canadian Forces;

(*e*) the Royal Canadian Mounted Police; or

(*f*) the Senate and the House of Commons.

Idem

(2) This Part applies to

(*a*) staffs of Ministers of the Crown and of members of the Senate and the House of Commons, and

(*b*) directors of corporations set out in Schedule II or of wholly-owned subsidiaries of such corporations

who shall, for the purposes of this Part, be deemed to be employees.

Taux de salaire et régimes de rémunération du personnel des ministres et des parlementaires

(3) Les dispositions qui suivent s'appliquent nonobstant toute disposition contraire de la présente partie :

a) les personnes visées à l'alinéa 3(2)*a*), ainsi que les membres des équipes de recherche des partis politiques représentés au Parlement à la date de sanction de la présente loi, ont, à compter de cette date, le droit de recevoir, au lieu du taux de salaire auquel elles auraient droit en l'absence du présent alinéa, un taux de salaire égal au produit de celui auquel elles avaient droit le 31 mars 1982 par cent six pour cent;

b) les taux de salaire en vigueur sous le régime de l'alinéa *a*) restent en vigueur pendant l'année suivant la date de sanction de la présente loi;

c) les taux de salaire restés en vigueur sous le régime de l'alinéa *b*) ne peuvent être augmentés de plus de cinq pour cent pendant l'année suivant celle qui est visée à cet alinéa;

d) les régimes de rémunération visés par les alinéas *a*) à *c*) sont prorogés de deux ans à compter de la date de sanction de la présente loi et leurs dispositions, à l'exclusion des taux de salaires, restent en vigueur pendant la période de prorogation sans autres modifications que celles que le Conseil du trésor peut, à son appréciation, autoriser.

CHAMP D'APPLICATION

Champ d'application

3. (1) La présente partie s'applique aux salariés employés :

a) dans les ministères, départements d'État et administrations mentionnés à l'annexe I;

b) dans les sociétés, corporations et organismes mentionnés à l'annexe II;

c) les filiales à cent pour cent des sociétés et corporations mentionnées à l'annexe II dans le cas où leurs salariés sont employés dans une entreprise fédérale au sens du *Code canadien du travail*;

d) dans les Forces canadiennes;

e) dans la Gendarmerie royale du Canada;

f) par le Sénat et par la Chambre des communes.

Idem

(2) La présente partie s'applique :

a) au personnel des ministres de la Couronne, des sénateurs et des députés de la Chambre des communes;

b) aux administrateurs des sociétés et corporations mentionnées à l'annexe II et à ceux de leurs filiales à cent pour cent.

Ces personnes sont, pour l'application de la présente partie, assimilées à des salariés.

Idem

(3) This Part applies to persons appointed by the Governor in Council to a position in a portion of the public service set out in Schedule I, to a board, commission or corporation set out in Schedule II or to a wholly-owned subsidiary of such corporation, and any persons so appointed shall, for the purposes of this Part, be deemed to be employees.

Idem

(4) This Part applies to employees of Canadian Pacific Limited and its subsidiaries who are employed in the operation of a railway and to the employees of the following:

(*a*) Ontario Northland Railway;

(*b*) Algoma Central Railway Company;

(*c*) Toronto Terminals Railway Company; and

(*d*) Shawinigan Falls Terminal Railway Company.

Binding on Her Majesty

(5) This Part is binding on Her Majesty in right of Canada.

EXTENSION OF COMPENSATION PLANS

Extension of compensation plans

4. (1) Every compensation plan that is in effect on June 29, 1982 for employees to whom this Part applies, including every compensation plan extended under section 5, shall be extended for the period of twenty-four months

(*a*) from the day on which the first increase in wage rates on or after June 29, 1982 would, but for section 8, occur under the compensation plan; or

(*b*) where no increase in wage rates is to occur under the compensation plan on or after June 29, 1982, from the day immediately following the day on which the compensation plan would, but for this section, expire.

Where prior undertaking to implement compensation plan

(2) For the purposes of subsection (1), a compensation plan shall be deemed to be in effect on June 29, 1982 if parties to the plan have, prior to that date, agreed in writing to establish the plan to have effect on the expiration of the previous compensation plan and the plan is established on or after June 29, 1982 without change.

Idem

(3) For the purposes of paragraph (1)(*a*), the first increase in wage rates on or after June 29, 1982 that would, but for section 8, occur under a compensation plan that is deemed under subsection (2) to be in effect on that date shall be deemed to be the first increase in wage rates that occurs after any increase in wage rates that occurs on the day the plan comes into effect.

Extension of compensation plan already expired

5. (1) Subject to subsection (2), where a compensation plan for employees to whom this Part applies would, but for this subsection, have expired before June 29, 1982 and no new compensation plan was established before that date, or on or after that date in accordance with subsection 4(2), the compensation plan shall be extended

Idem

(3) La présente partie s'applique aux personnes nommées par le gouverneur en conseil dans les administrations mentionnées à l'annexe I, dans les sociétés, corporations ou organismes mentionnés à l'annexe II ou dans les filiales à cent pour cent de ces sociétés ou corporations; ces personnes sont, pour l'application de la présente partie, assimilées à des salariés.

Idem

(4) La présente partie s'applique aux salariés du Canadien Pacifique Limitée et de ses filiales affectés à l'exploitation des chemins de fer et à ceux des sociétés suivantes :

a) *Ontario Northland Railway;*

b) *Algoma Central Railway Company;*

c) *Toronto Terminals Railway Company;*

d) *Shawinigan Falls Terminal Railway Company.*

Sa Majesté est liée

(5) La présente partie lie Sa Majesté du chef du Canada.

PROROGATION DES RÉGIMES DE RÉMUNÉRATION

Prorogation

4. (1) Le régime de rémunération en vigueur le 29 juin 1982 pour des salariés visés par la présente partie, notamment tout régime de rémunération prorogé en vertu de l'article 5, est prorogé de deux ans à compter de l'une des dates suivantes :

a) celle de la première augmentation des taux de salaire qui, en l'absence de l'article 8, surviendrait au plus tôt le 29 juin 1982;

b) celle prévue, en l'absence du présent article, pour son expiration, s'il ne comporte aucune augmentation de salaire le 29 juin 1982 au plus tôt.

Entente antérieure

(2) Pour l'application du paragraphe (1), un régime de rémunération est réputé en vigueur le 29 juin 1982, si les parties sont auparavant convenues par écrit de l'établir de façon qu'il entre en vigueur à l'expiration du régime de rémunération précédent et s'il est établi au plus tôt à cette date sans modification.

Idem

(3) Pour l'application de l'alinéa (1)*a*) au régime de rémunération visé au paragraphe (2), l'augmentation de taux de salaire qui suit celle qui survient à la date d'entrée en vigueur du régime est réputée celle que vise cet alinéa.

Prorogation des régimes de rémunération expirés

5. (1) Sous réserve du paragraphe (2), le régime de rémunération de salariés visés par la présente partie qui, en l'absence du présent paragraphe, aurait expiré avant le 29 juin 1982 et qui n'a pas été remplacé avant cette date, ou à cette date au plus tôt en conformité avec le paragraphe 4(2), est prorogé :

a) s'il s'agit d'un régime dont la date d'expiration est prévue pour le 29 juin 1981 au (*a*) where the compensation plan would have expired on or after June 29, 1981, for the twelve month period immediately following the day the plan would have expired; or

(*b*) where the compensation plan would have expired before June 29, 1981, until June 29, 1982.

Extension of compensation plan for management employees

(2) A compensation plan for management employees that would, but for this subsection, have expired before June 29, 1982 shall be extended until June 30, 1982.

Definition of "management employees"

(3) For the purposes of subsection (2), "management employees" means

(*a*) persons referred to in subsection 3(3);

(*b*) persons paid as former senior executive officers (SX) or as senior executive officer equivalents (SXE);

(*c*) legal officers, levels 2B, 3A and 3B;

(*d*) the executive group of the management category;

(*e*) senior military personnel with the rank of Lieutenant General, Major General, Brigadier General, Major General (legal), Brigadier General (legal), Colonel (legal) and Lieutenant Colonel (legal); or

(*f*) senior Royal Canadian Mounted Police personnel with the rank of Deputy Commissioner, Assistant Commissioner and Chief Superintendent and civilian Royal Canadian Mounted Police personnel paid at an equivalent rate.

Terms and conditions

6. (1) Notwithstanding any other Act of Parliament except the *Canadian Human Rights Act* but subject to this section and section 7, the terms and conditions of

(*a*) every compensation plan that is extended under section 4 or 5, and

(*b*) every collective agreement or arbitral award that includes such a compensation plan,

shall, subject to this Part, continue in force without change for the period for which the compensation plan is extended.

Authorized changes

(2) The Treasury Board may authorize any change to any terms and conditions, including any increase in wage rates of not more than nine per cent,

(*a*) of a compensation plan that would, but for section 5, have expired before June 29, 1982; or

(*b*) of a collective agreement or arbitral award that includes such a compensation plan.

Where parties fail to agree

(3) The Treasury Board may change any terms and conditions, including any increase in wage rates of not more than nine per cent,

(*a*) of a compensation plan that would, but for section 5, have expired before June 29, 1982; or

(*b*) of a collective agreement or arbitral award that includes such a compensation plan,

where the parties to the plan fail to agree to change those terms and conditions.

plus tôt, d'une année à compter de cette date d'expiration;

b) s'il s'agit d'un régime dont la date prévue d'expiration est antérieure au 29 juin 1981, jusqu'au 29 juin 1982.

Prorogation du régime de rémunération des cadres de direction

(2) Le régime de rémunération de cadres de direction qui, en l'absence du présent paragraphe, aurait expiré avant le 29 juin 1982 est prorogé jusqu'au 30 juin 1982.

Définition de cadres de direction

(3) Pour l'application du paragraphe (2), sont des cadres de direction ou leur sont assimilés :

a) les personnes visées au paragraphe 3(3);

b) les personnes rémunérées comme anciens cadres supérieurs (SX) ou équivalents (SXE);

c) les conseillers juridiques de niveau 2B, 3A et 3B;

d) le groupe de direction de la catégorie de la gestion;

e) le personnel militaire supérieur du rang de lieutenant-général, major-général, brigadier-général, major-général (avocat), brigadier-général (avocat), colonel (avocat) et lieutenant-colonel (avocat);

f) le personnel supérieur de la Gendarmerie royale du Canada du rang de sous-commissaire, de commissaire adjoint et de surintendant principal ainsi que le personnel civil de la Gendarmerie royale du Canada payé à un taux équivalent.

Prorogation des dispositions

6. (1) Par dérogation à toute autre loi du Parlement, à l'exception de la *Loi canadienne sur les droits de la personne*, mais sous réserve du présent article et de l'article 7, les dispositions d'un régime de rémunération prorogé en vertu des articles 4 ou 5 ou d'une convention collective ou décision arbitrale qui comporte un pareil régime demeurent en vigueur sans modification, sous réserve de la présente partie, pendant la période de prorogation.

Modifications autorisées

(2) Le conseil du Trésor peut autoriser la modification des dispositions, y compris une augmentation des taux de salaire d'un maximum de neuf pour cent, d'un régime de rémunération qui, en l'absence de l'article 5, aurait expiré avant le 29 juin 1982 ou d'une convention collective ou décision arbitrale qui comporte pareil régime.

Désaccord entre les parties

(3) Le conseil du Trésor peut modifier les dispositions, notamment en augmentant d'un maximum de neuf pour cent les taux de salaire d'un régime de rémunération qui, en l'absence de l'article 5, aurait expiré avant le 29 juin 1982 ou d'une convention collective ou décision arbitrale qui comporte un pareil régime, lorsque les parties au régime ne parviennent pas à s'entendre sur les modifications à y apporter.

Work sharing agreement

(4) Nothing in this section affects any work sharing agreement that has been approved for the purposes of section 37 of the *Unemployment Insurance Act, 1971.*

Exclusion

(5) Employees or groups of employees whose salary range as of June 29, 1982 has a maximum that equals or exceeds forty-nine thousand five hundred dollars shall not, for the twenty-four month period during which their compensation plan is extended under section 4, be entitled to the merit increases, incremental increases or performance awards that would, but for this subsection, form part of their compensation plan.

Amendment to collective agreements and arbitral awards

7. The parties to a collective agreement, or the persons bound by an arbitral award, that includes a compensation plan that is extended under section 4 may, by agreement, amend any terms and conditions of the collective agreement or arbitral award other than wage rates or other terms and conditions of the compensation plan.

WAGE RATES

Override

8. (1) Notwithstanding any other Act of Parliament, any provision of a compensation plan for employees to whom this Part applies that provides for an increase in wage rates for the employees on or after June 29, 1982 shall be of no effect.

Exception

(2) Subsection (1) does not apply in respect of any increase in wage rates that occurs on the day a compensation plan that is deemed under subsection 4(2) to be in effect on June 29, 1982 comes into effect.

Idem

(3) Subsection (1) does not apply in respect of the first increase in wage rates for employees on or after June 29, 1982 if the increase, calculated on an annual basis, does not, in the opinion of the Treasury Board, exceed six per cent.

Increase in wage rates

9. (1) Notwithstanding any other Act of Parliament, every compensation plan for employees to whom this Part applies shall be deemed to include a provision to the effect that

(*a*) wage rates in effect under the plan

(i) on the day the plan would, but for section 4, expire, or

(ii) on the day immediately prior to the day on which the first increase in wage rates on or after June 29, 1982 would, but for section 8, occur under the plan,

as the case may be, shall be increased for the twelve month period immediately following that day

(iii) in the case of a collective agreement or an arbitral award, by six per cent, and

(iv) in any other case, by not more than six per cent;

and

(*b*) wage rates in effect under paragraph (*a*) shall be increased for the twelve month period immediately following the period referred to in that paragraph

Travail partagé

(4) Le présent article ne porte nullement atteinte aux accords de partage de travail qui ont été approuvés dans le cadre de l'article 37 de la *Loi de 1971 sur l'assurance-chômage*.

Exclusion

(5) Les salariés et groupes de salariés dont l'échelle de salaire atteint, le 29 juin 1982, un maximum égal ou supérieur à quarante-neuf mille cinq cents dollars n'ont pas droit pendant les deux ans de la prorogation de leur régime de rémunération en vertu de l'article 4, aux augmentations au mérite, aux augmentations par échelon et aux primes au rendement que, en l'absence du présent paragraphe, comporterait leur régime de rémunération.

Modification de conventions collectives et des décisions arbitrales

7. Les parties à une convention collective, ou les personnes visées par une décision arbitrale, qui comporte un régime de rémunération prorogé en vertu de l'article 4 peuvent s'entendre pour modifier les dispositions de la convention ou de la décision, à l'exception des taux de salaire et des autres dispositions du régime.

TAUX DE SALAIRE

Suspension

8. (1) Par dérogation à toute autre loi du Parlement, sont sans effet les dispositions du régime de rémunération de salariés visés par la présente partie qui prévoient des augmentations des taux de salaire pour le 29 juin 1982 au plus tôt.

Exception

(2) Le paragraphe (1) ne s'applique pas à l'augmentation de taux de salaire qui survient à la date d'entrée en vigueur du régime de rémunération visé au paragraphe 4(2).

Idem

(3) Le paragraphe (1) ne s'applique pas à la première augmentation des taux de salaire à survenir le 29 juin 1982 au plus tôt si, calculée sur une base annuelle, elle ne dépasse pas six pour cent, de l'avis du conseil du Trésor.

Augmentation des taux de salaire

9. (1) Par dérogation à toute autre loi du Parlement, le régime de rémunération de salariés visés par la présente partie est réputé comporter les dispositions suivantes :

a) les taux de salaire en vigueur soit à la date où le régime, en l'absence de l'article 4, aurait expiré, soit à la date précédant le jour, prévu pour le 29 juin 1982 au plus tôt, où ils auraient été, en l'absence de l'article 8, augmentés pour la première fois, sont, pour l'année suivant la date applicable, augmentés :

(i) dans le cas d'une convention collective ou d'une décision arbitrale, de six pour cent,

(ii) dans les autres cas, d'un maximum de six pour cent;

b) les taux de salaire en vigueur conformément à l'alinéa *a*) sont, pour l'année qui suit celle visée à cet alinéa, augmentés :

(i) dans le cas d'une convention collective ou d'une décision arbitrale, de cinq pour cent,

(ii) dans les autres cas, d'un maximum de cinq pour cent.

(i) in the case of a collective agreement or an arbitral award, by five per cent, and

(ii) in any other case, by not more than five per cent.

Where prior undertaking to implement compensation plan

(2) For the purposes of subparagraph (1)(*a*)(ii), the first increase in wage rates on or after June 29, 1982 that would, but for section 8, occur under a compensation plan that is deemed under subsection 4(2) to be in effect on that date shall be deemed to be the first increase in wage rates that occurs after any increase in wage rates that occurs on the day the plan comes into effect.

Retroactive increase in rates of pay

10. A compensation plan that is extended under subsection 5(1) shall be deemed to include a provision to the effect that wage rates in effect under the plan on the day the plan would, but for subsection 5(1), have expired shall be increased

(*a*) in the case of a compensation plan referred to in paragraph 5(1)(*a*), for the twelve month period referred to in that paragraph by not more than nine per cent; and

(*b*) in the case of a compensation plan referred to in paragraph 5(1)(*b*),

(i) for the period immediately preceding June 29, 1981, by such amounts as the Treasury Board may authorize, and

(ii) for the period commencing on June 30, 1981 and ending on June 29, 1982, by not more than nine per cent.

ADMINISTRATION

Powers, duties and functions of Treasury Board

11. (1) The Treasury Board has such powers and shall perform such duties and functions in relation to this Part as are necessary to enable it to determine whether an employer of employees to whom this Part applies is complying with this Part.

Information and documentation

(2) The Treasury Board may require from an employer of employees to whom this Part applies such information and documentation as it considers necessary to enable it to make a determination as to whether or not the employer is complying with this Part.

Treasury Board direction

(3) Where the Treasury Board determines pursuant to this section that this Part is not being complied with, it may issue such directive as it deems appropriate to rectify the situation.

Provision of compensation plans of no force or effect

12. A provision of a compensation plan for employees to whom this Part applies entered into or established at any time is of no force or effect to the extent that it provides for an increase in wage rates that would bring wage rates to a level that they would, but for this Part, have reached.

ORDERS

Orders

13. The Governor in Council may, on the recommendation of the Treasury Board, by order,

(*a*) substitute, in respect of a compensation plan or a class of compensation plans, a percentage different from that set out in paragraph 9(1)(*b*), where he considers it

Hausses antérieures

(2) Pour l'application de l'alinéa (1)*a*) au régime de rémunération visé au paragraphe 4(2), l'augmentation de taux de salaire qui suit celle qui survient à la date d'entrée en vigueur du régime est réputée celle que vise cet alinéa.

Augmentation avec effet rétroactif

10. Un régime de rémunération prorogé en vertu du paragraphe 5(1) est réputé comporter une disposition prévoyant que les taux de salaire en vigueur à la date où le régime aurait, en l'absence du paragraphe 5(1), expiré sont augmentés :

a) pour l'année mentionnée à l'alinéa 5(1)*a*), dans le cas d'un régime visé à cet alinéa, d'un maximum de neuf pour cent;

b) dans le cas d'un régime visé à l'alinéa 5(1)*b*) :

(i) pour la période précédant le 29 juin 1981, du montant autorisé par le conseil du Trésor,

(ii) pour la période allant du 30 juin 1981 au 29 juin 1982, d'un maximum de neuf pour cent.

ADMINISTRATION

Attributions du conseil du Trésor

11. (1) Le conseil du Trésor a les pouvoirs et fonctions nécessaires pour lui permettre de déterminer si l'employeur de salariés visés par la présente partie s'y conforme.

Renseignements et documents

(2) Dans l'exercice des pouvoirs et fonctions que lui confère le paragraphe (1), le conseil du Trésor peut exiger de l'employeur visé à ce paragraphe les renseignements et les documents qu'il estime nécessaires.

Directives du conseil du Trésor

(3) Le conseil du Trésor peut donner les instructions qu'il juge à propos pour remédier à la situation dans les cas où il constate l'inobservation de la présente partie.

Invalidité de certaines dispositions

12. Indépendamment de sa date d'établissement, est nulle la disposition du régime de rémunération de salariés visés par la présente partie qui a pour effet de porter les taux de salaire au niveau qu'ils auraient atteint en l'absence de celle-ci.

DÉCRETS

Décrets

13. Le gouverneur en conseil peut, sur la recommandation du conseil du Trésor, par décret :

a) substituer dans un régime de rémunération ou une catégorie de régimes un pourcentage différent de celui que prévoit l'alinéa 9(1)*b*), s'il le juge d'intérêt public to be in the public interest to do so on grounds of labour shortages;

(*b*) amend Schedule I by adding thereto any department or ministry of state of the Government of Canada or other portion of the public service; or

(*c*) amend Schedule II by adding thereto any board or commission or any corporation not less than ninety per cent of the shares or capital of which is owned by Her Majesty in right of Canada.

Tabling of report

13.1 The President of the Privy Council shall have tabled each year in both Houses of Parliament a report containing the names and ranges of compensation of persons appointed by the Governor in Council to a position described in subsection 3(3).

PART II

R.S. c. S-8

SENATE AND HOUSE OF COMMONS ACT

1974-75-76, c. 44, s. 2; 1980-81-82, c. 77, s. 2

14. (1) Subsections 34(5) and (6) of the *Senate and House of Commons Act* are repealed and the following substituted therefor:

Override as of July 1, 1982

"(4.1) Notwithstanding subsection (3), there shall be paid to every member of the Senate and House of Commons

(*a*) for the period commencing July 1, 1982 and terminating on December 31, 1982, a sessional allowance at the rate per annum that is obtained by multiplying

(i) the sessional allowance payable to each such member for the twelve month period immediately preceding January 1, 1982

by

(ii) one hundred and six per cent;

(*b*) for the twelve month period commencing January 1, 1983, a sessional allowance at the rate per annum that is the lesser of

(i) the rate per annum that would, but for this subsection, be determined under subsection (3), and

(ii) the rate per annum that is obtained by multiplying

(A) the average of the rates per annum at which a sessional allowance was payable to each such member for the twelve month period commencing January 1, 1982

by

(B) one hundred and six per cent; and

(*c*) for the twelve month period commencing January 1, 1984, a sessional allowance at the rate per annum that is the lesser of

(i) the rate per annum that would, but for this subsection, be determined under subsection (3), and

(ii) the rate per annum that is obtained by multiplying

pour des motifs de pénurie de main-d'œuvre;

b) ajouter à l'annexe I tout ministère, département d'État ou administration;

c) ajouter à l'annexe II tout organisme, ou toute société ou corporation dont au moins quatre-vingt-dix pour cent des actions ou du capital appartiennent à Sa Majesté du chef du Canada.

Dépôt du rapport

13.1 Le président du Conseil privé dépose chaque année aux deux chambres du Parlement un rapport donnant le nom et l'échelle de traitement des personnes nommées par le gouverneur en conseil à un poste visé au paragraphe 3(3).

PARTIE II

S.R., c. S-8

LOI SUR LE SÉNAT ET LA CHAMBRE DES COMMUNES

1974-75-76, c. 44, art. 2; 1980-81-82, c. 77, art. 2

14. (1) Les paragraphes 34(5) et (6) de la *Loi sur le Sénat et la Chambre des communes* sont abrogés et remplacés par ce qui suit :

Nouvelle formule à partir du 1^{er} juillet 1982

«(4.1) Par dérogation au paragraphe (3), les sénateurs et députés reçoivent chacun :

a) pour la période allant du 1^{er} juillet 1982 au 31 décembre 1982, une indemnité de session dont le montant annuel est égal au produit de leur indemnité de 1981 par cent six pour cent;

b) pour 1983, une indemnité de session dont le montant annuel est :

(i) soit celui qui, en l'absence du présent paragraphe, serait calculé en vertu du paragraphe (3),

(ii) soit égal au produit, si celui-ci est inférieur, de l'indemnité moyenne payable pour 1982 par cent six pour cent;

c) pour 1984, une indemnité de session dont le montant annuel est :

(i) soit celui qui, en l'absence du présent paragraphe, serait calculé en vertu du paragraphe (3),

(ii) soit égal au produit, si celui-ci est inférieur, de l'indemnité payable en vertu de l'alinéa *b*) par cent cinq pour cent.

(A) the sessional allowance payable to each such member under paragraph (*b*)

by

(B) one hundred and five per cent.

Calculation of allowance after January 1, 1985

(4.2) For the purposes of calculating a sessional allowance under subsection (3) for the twelve month period commencing January 1, 1985, the sessional allowance payable for the twelve month period immediately preceding that twelve month period shall be deemed to be the sessional allowance payable under paragraph (4.1)(*c*).

Adjustment of certain other allowances and salaries for Ministers, Senators and members

(5) The salaries and allowances payable to members of the Senate and House of Commons, pursuant to sections 33, 41 and 42 and subsection 43(3) of this Act, sections 4 and 5 of the *Salaries Act* and subsection 4(1) of the *Parliamentary Secretaries Act* shall, for the twelve month period commencing January 1, 1981 and for each twelve month period thereafter, be adjusted in the manner provided by subsection (3) or (4.1), as the case may be, as if they were sessional allowances.

Rounding of amounts

(6) A sessional allowance or other allowance determined for a twelve month period pursuant to subsection (3), (4.1) or (5) that is not a multiple of one hundred dollars shall be rounded to the closest multiple of one hundred dollars that is lower than the sessional allowance or other allowance so determined."

R.S. c. J-1

JUDGES ACT

1980-81-82, c. 50, s. 12

15. Subsection 19.2(3) of the *Judges Act* is repealed and the following substituted therefor:

Override as of April 1, 1983

"(2.1) Notwithstanding subsection (1), the salary annexed to an office of judge

(*a*) for the twelve month period commencing April 1, 1983 shall be the lesser of

(i) the amount that would, but for this subsection, be determined under subsection (1), and

(ii) the amount obtained by multiplying

(A) the salary annexed to that office for the twelve month period commencing April 1, 1982

by

(B) one hundred and six per cent; and

(*b*) for the twelve month period commencing April 1, 1984 shall be the lesser of

(i) the amount that would, but for this subsection, be determined under subsection (1), and

(ii) the amount obtained by multiplying

(A) the salary annexed to that office under paragraph (*a*)

by

(B) one hundred and five per cent.

Calcul de l'indemnité de session après le 1er janvier 1985

(4.2) Dans le calcul de l'indemnité de session payable en vertu du paragraphe (3) pour 1985, le montant à prendre en compte est celui qui aura été établi en vertu de l'alinéa (4.1)*c*) pour 1984.

Rajustement annuel d'autres indemnités et traitements des ministres, sénateurs et députés

(5) Les traitements et indemnités que les sénateurs et les députés reçoivent en application des articles 33, 41, 42 et du paragraphe 43(3) de la présente loi, des articles 4 et 5 de la *Loi sur les traitements* et du paragraphe 4(1) de la *Loi sur les secrétaires parlementaires* sont, pour 1981 et les années suivantes, assimilés aux indemnités de session et rajustés selon les modalités prévues aux paragraphes (3) ou (4.1).

Arrondissement des sommes

(6) Les indemnités, notamment celles de session, calculées pour une année conformément aux paragraphes (3), (4.1) ou (5) sont arrondies à la centaine de dollars inférieure.»

LOI SUR LES JUGES

S.R., c. J-1

1980-81-82, c. 50, art. 12

15. Le paragraphe 19.2(3) de la *Loi sur les juges* est abrogé et remplacé par ce qui suit :

Nouvelle formule à partir du 1er avril 1983

«(2.1) Par dérogation au paragraphe (1), le traitement des juges se calcule de la façon suivante:

a) pour l'année qui commence le 1er avril 1983, il est égal :

(i) soit à celui qui, en l'absence du présent paragraphe, serait calculé conformément au paragraphe (1),

(ii) soit au produit, si celui-ci est inférieur, du traitement payable pour l'année qui commence le 1er avril 1982 par cent six pour cent;

b) pour l'année qui commence le 1er avril 1984, il est égal;

(i) soit à celui qui, en l'absence du présent paragraphe, serait calculé conformément au paragraphe (1),

(ii) soit au produit, si celui-ci est inférieur, du traitement calculé conformément à l'alinéa *a*) par cent cinq pour cent.

Calculation of salary after April 1, 1985

(2.2) For the purposes of determining the salary annexed to an office of judge under subsection (1) for the twelve month period commencing April 1, 1985, the salary annexed to that office for the twelve month period immediately preceding that twelve month period shall be deemed to be the salary determined under paragraph (2.1)(*b*).

Rounding of amounts

(3) A salary determined for a twelve month period pursuant to subsection (1) or (2.1) that is not a multiple of one hundred dollars shall be rounded to the closest multiple of one hundred dollars that is lower than the salary so determined."

PART III

COMMENCEMENT

Orders

16. The Governor in Council may, by order, terminate the application of this Act in respect of an employee or a group of employees to which this Act applies.

Coming into force

17. This Act shall be deemed to have come into force on June 29, 1982.

Calcul du traitement après le 1er avril 1985

(2.2) Dans le calcul du traitement payable aux juges en vertu du paragraphe (1) pour l'année qui commence le 1er avril 1985, le montant a prendre en compte est celui qui aura été établi en vertu de l'alinéa (2.1)*b*) pour l'année qui commence le 1er avril 1984.

Arrondissement des sommes

(3) Les traitements calculés pour une année conformément aux paragraphes (1) ou (2.1) sont arrondis à la centaine de dollars inférieure.»

PARTIE III

ENTRÉE EN VIGUEUR

Décret

16. Le gouverneur en conseil peut, par décret, mettre fin à l'application de la présente loi à l'égard de salariés ou de groupes de salariés qu'elle vise.

Entrée en vigueur

17. La présente loi est réputée être entrée en vigueur le 29 juin 1982.

SCHEDULE I

(Paragraph 3(1)(*a*))

Departments and Ministries of State

Department of Agriculture
Ministère de l'Agriculture

Department of Communications
Ministère des Communications

Department of Consumer and Corporate Affairs
Ministère de la Consommation et des Corporations

Ministry of State for Economic Development
Département d'État au Développement économique

Department of Employment and Immigration
Ministère de l'Emploi et de l'Immigration

Department of Energy, Mines and Resources
Ministère de l'Énergie, des Mines et des Ressources

Department of the Environment
Ministère de l'Environnement

Department of External Affairs
Ministère des Affaires extérieures

Department of Finance
Ministère des Finances

Department of Fisheries and Oceans
Ministère des Pêches et des Océans

Department of Indian Affairs and Northern Development
Ministère des Affaires indiennes et du Nord canadien

Department of Industry, Trade and Commerce
Ministère de l'Industrie et du Commerce

Department of Insurance
Département des assurances

Department of Justice
Ministère de la Justice

Department of Labour
Ministère du Travail

Department of National Defence (*including the Canadian Forces*)
Ministère de la Défense nationale (y compris les Forces canadiennes)

Department of National Health and Welfare
Ministère de la Santé nationale et du Bien-être social

Department of National Revenue
Ministère du Revenu national

Department of Public Works
Ministère des Travaux publics

Department of Regional Economic Expansion
Ministère de l'Expansion économique régionale

Ministry of State for Science and Technology
Département d'État des Sciences et de la Technologie

Department of the Secretary of State
Secrétariat d'État du Canada

Ministry of State for Social Development
Département d'État au Développement social

Department of the Solicitor General
Ministère du Solliciteur général

Department of Supply and Services
Ministère des Approvisionnements et Services

Department of Transport
Ministère des Transports

Department of Veterans Affairs
Ministère des Affaires des anciens combattants

ANNEXE I

(Paragraphe 3(1)*a*))

Ministères et départements d'État

Département des assurances
Department of Insurance

Département d'État au Développement économique
Ministry of State for Economic Development

Département d'État au Développement social
Ministry of State for Social Development

Département d'État des Sciences et de la Technologie
Ministry of State for Science and Technology

Ministère des Affaires des anciens combattants
Department of Veterans Affairs

Ministère des Affaires extérieures
Department of External Affairs

Ministère des Affaires indiennes et du Nord canadien
Department of Indian Affairs and Northern Development

Ministère de l'Agriculture
Department of Agriculture

Ministère des Approvisionnements et Services
Department of Supply and Services

Ministère des Communications
Department of Communications

Ministère de la Consommation et des Corporations
Department of Consumer and Corporate Affairs

Ministère de la Défense nationale (*y compris les Forces canadiennes*)
Department of National Defence (including the Canadian Forces)

Ministère de l'Emploi et de l'Immigration
Department of Employment and Immigration

Ministère de l'Énergie, des Mines et des Ressources
Department of Energy, Mines and Resources

Ministère de l'Environnement
Department of the Environment

Ministère de l'Expansion économique régionale
Department of Regional Economic Expansion

Ministère des Finances
Department of Finance

Ministère de l'Industrie et du Commerce
Department of Industry, Trade and Commerce

Ministère de la Justice
Department of Justice

Ministère des Pêches et des Océans
Department of Fisheries and Oceans

Ministère du Revenu national
Department of National Revenue

Ministère de la Santé nationale et du Bien-être social
Department of National Health and Welfare

Ministère du Solliciteur général
Department of the Solicitor General

Ministère des Transports
Department of Transport

Ministère du Travail
Department of Labour

Ministère des Travaux publics
Department of Public Works

Secrétariat d'État du Canada
Department of the Secretary of State

Other portions of the public service

Advisory Council on the Status of Women
Conseil consultatif de la situation de la femme

Agricultural Stabilization Board
Office de stabilisation des prix agricoles

Atlantic Development Council
Conseil de développement de la région de l'Atlantique

Atomic Energy Control Board
Commission de contrôle de l'Énergie atomique

Bureau of Pension Advocates
Bureau de services juridiques des pensions

Canada Employment and Immigration Commission
Commission de l'emploi et de l'immigration du Canada

Canada Labour Relations Board
Conseil canadien des relations de travail

Canadian Dairy Commission
Commission canadienne du lait

Canadian Government Photo Centre
Centre de photographie du gouvernement canadien

Canadian Grain Commission
Commission canadienne des grains

Canadian Human Rights Commission
Commission canadienne des droits de la personne

Canadian Intergovernmental Conference Secretariat
Secrétariat des conférences intergouvernementales canadiennes

Canadian International Development Agency
Agence canadienne de développement international

Canadian Livestock Feed Board
Office canadien des provendes

Canadian Penitentiary Service
Service canadien des pénitenciers

Canadian Pension Commission
Commission canadienne des pensions

Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Canadian Transport Commission
Commission canadienne des transports

Canadian Unity Information Office
Centre d'information sur l'unité canadienne

Communications Security Establishment, Department of National Defence
Centre de la sécurité des télécommunications, ministère de la Défense nationale

The Correctional Service of Canada
Le Service correctionel du Canada

Defence Research Board
Conseil de recherches pour la défense

The Director of Soldier Settlement
Directeur de l'établissement de soldats

The Director, The Veterans' Land Act
Directeur des terres destinées aux anciens combattants

Economic Council of Canada
Conseil économique du Canada

Emergency Planning Canada
Planification d'urgence Canada

Energy Supplies Allocation Board
Office de répartition des approvisionnements d'énergie

Federal Court of Canada, Staff of
Cour fédérale du Canada, Personnel de la

Autres

Administration de l'assistance à l'agriculture des Prairies
Prairie Farm Assistance Administration

Administration du pipe-line du Nord
Northern Pipeline Agency

Administration du rétablissement agricole des Prairies
Prairie Farm Rehabilitation Administration

Agence canadienne de développement international
Canadian International Development Agency

Archives publiques
Public Archives

Bibliothèque nationale
National Library

Bureau du commissaire à la magistrature fédérale
Office of the Commissioner for Federal Judicial Affairs

Bureau du Commissaire aux langues officielles
Office of the Commissioner of Official Languages

Bureau du Conseil privé
Privy Council Office

Bureau du contrôleur général du Canada
Office of the Comptroller General

Bureau de la coordonnatrice de la situation de la femme
Office of the Co-ordinator, Status of Women

Bureau du Directeur général des élections
Office of the Chief Electoral Officer

Bureau de services juridiques des pensions
Bureau of Pension Advocates

Bureau du surintendant des faillites
Office of the Superintendent of Bankruptcy

Bureau du vérificateur général
Office of the Auditor General

Centre de la sécurité des télécommunications, ministère de la Défense nationale
Communications Security Establishment, Department of National Defence

Centre de photographie du gouvernement canadien
Canadian Government Photo Centre

Centre d'information sur l'unité canadienne
Canadian Unity Information Office

Comité consultatif sur le statut de réfugié
Refugee Status Advisory Committee

Commission des allocations aux anciens combattants
War Veterans Allowance Board

Commission d'appel de l'immigration
Immigration Appeal Board

Commission d'assurance-chômage
Unemployment Insurance Commission

Commission canadienne des droits de la personne
Canadian Human Rights Commission

Commission canadienne des grains
Canadian Grain Commission

Commission canadienne du lait
Canadian Dairy Commission

Commission canadienne des pensions
Canadian Pension Commission

Commission canadienne des transports
Canadian Transport Commission

Commission de la Capitale nationale
National Capital Commission

Commission de contrôle de l'énergie atomique
Atomic Energy Control Board

Commission de l'emploi et de l'immigration du Canada
Canada Employment and Immigration Commission

Federal-Provincial Relations Office
Secrétariat des relations fédérales-provinciales

Fisheries and Oceans Research Advisory Council
Conseil consultatif de recherches sur les pêcheries et les océans

Fisheries Prices Support Board
Office des prix des produits de la pêche

Government Printing Bureau
Imprimerie du gouvernement canadien

Immigration Appeal Board
Commission d'appel de l'immigration

International Joint Commission (Canadian Section)
Commission mixte internationale (Section canadienne)

Law Reform Commission of Canada
Commission de réforme du droit du Canada

Medical Research Council of Canada
Conseil de recherches médicales du Canada

National Capital Commission
Commission de la Capitale nationale

National Energy Board
Office national de l'énergie

National Film Board
Office national du film

National Library
Bibliothèque nationale

National Museums of Canada
Musées nationaux du Canada

National Parole Board
Commission nationale des libérations conditionnelles

National Research Council of Canada
Conseil national de recherches du Canada

Natural Sciences and Engineering Research Council
Conseil de recherches en sciences naturelles et en génie

Non-Public Funds, Canadian Forces, Staff of
Fonds non-publics, Forces Canadiennes, personnel des

Northern Canada Power Commission
Commission d'énergie du Nord canadien

Northern Pipeline Agency
Administration du pipe-line du Nord

Office of the Auditor General
Bureau du vérificateur général

Office of the Chief Electoral Officer
Bureau du Directeur général des élections

Office of the Commissioner for Federal Judicial Affairs
Bureau du commissaire à la magistrature fédérale

Office of the Commissioner of Official Languages
Bureau du Commissaire aux langues officielles

Office of the Comptroller General
Bureau du contrôleur général du Canada

Office of the Co-ordinator, Status of Women
Bureau de la coordonnatrice de la situation de la femme

Office of the Governor-General's Secretary
Secrétariat du gouverneur général

Office of the Superintendent of Bankruptcy
Bureau du surintendant des faillites

Pension Review Board
Conseil de revision des pensions

Prairie Farm Rehabilitation Administration
Administration du rétablissement agricole des Prairies

Privy Council Office
Bureau du Conseil privé

Commission d'énergie du Nord canadien
Northern Canada Power Commission

Commission de la Fonction publique
Public Service Commission

Commission mixte internationale (Section canadienne)
International Joint Commission (Canadian Section)

Commission nationale des libérations conditionnelles
National Parole Board

Commission sur les pratiques restrictives du commerce
Restrictive Trade Practices Commission

Commission de réforme du droit du Canada
Law Reform Commission of Canada

Commission des relations de travail dans la Fonction publique
Public Service Staff Relations Board

Commission de révision de l'impôt
Tax Review Board

Commission de révision des lois
Statute Revision Commission

Commission du tarif
Tariff Board

Conseil canadien des relations de travail
Canadian Labour Relations Board

Conseil consultatif de la situation de la femme
Advisory Council on the Status of Women

Conseil consultatif de recherches sur les pêcheries et les océans
Fisheries and Oceans Research Advisory Council

Conseil de développement de la région de l'Atlantique
Atlantic Development Council

Conseil économique du Canada
Economic Council of Canada

Conseil national de recherches du Canada
National Research Council of Canada

Conseil de la radiodiffusion et des télécommunications canadiennes
Canadian Radio-television and Telecommunications

Conseil de recherches pour la défense
Defence Research Board

Conseil de recherches médicales du Canada
Medical Research Council of Canada

Conseil de recherches en sciences humaines
Social Sciences and Humanities Research Council

Conseil de recherches en sciences naturelles et en génie
Natural Sciences and Engineering Research Council

Conseil de revision des pensions
Pension Review Board

Conseil des sciences du Canada
Science Council of Canada

Cour fédérale du Canada, Personnel de la
Federal Court of Canada, Staff of

Cour suprême du Canada, Personnel de la
Supreme Court of Canada, Staff of

Directeur de l'établissement de soldats
The Director of Soldier Settlement

Directeur des terres destinées aux anciens combattants
The Director, The Veteran's Land Act

Fonds non-publics, Forces canadiennes, personnel des
Non-Public Funds, Canadian Forces, Staff of

Imprimerie du gouvernement canadien
Government Printing Bureau

Musées nationaux du Canada
National Museums of Canada

Office canadien des provendes
Canadian Livestock Feed Board

Public Archives
Archives publiques

Public Service Commission
Commission de la Fonction publique

Public Service Staff Relations Board
Commission des relations de travail dans la Fonction publique

Refugee Status Advisory Committee
Comité consultatif sur le statut de réfugié

Restrictive Trade Practices Commission
Commission sur les pratiques restrictives du commerce

Science Council of Canada
Conseil des Sciences du Canada

Social Sciences and Humanities Research Council
Conseil de recherches en sciences humaines

Statistics Canada
Statistique Canada

Statute Revision Commission
Commission de révision des lois

Supreme Court of Canada, Staff of
Cour suprême du Canada, Personnel de la

Tariff Board
Commission du tarif

Tax Review Board
Commission de révision de l'impôt

Treasury Board Secretariat
Secrétariat du conseil du Trésor

War Veterans Allowance Board
Commission des allocations aux anciens combattants

Office national de l'énergie
National Energy Board

Office national du film
National Film Board

Office des prix des produits de la pêche
Fisheries Prices Support Board

Office de répartition des approvisionnements d'énergie
Energy Supplies Allocation Board

Office de stabilisation des prix agricoles
Agricultural Stabilization Board

Planification d'urgence Canada
Emergency Planning Canada

Secrétariat des conférences intergouvernementales canadiennes
Canadian Intergovernmental Conference Secretariat

Secrétariat du conseil du Trésor
Treasury Board Secretariat

Secrétariat du gouverneur général
Office of the Governor-General's Secretary

Secrétariat des relations fédérales-provinciales
Federal-Provincial Relations Office

Service canadien des pénitenciers
Canadian Penitentiary Service

Le Service correctionnel du Canada
The Correctional Service of Canada

Statistique Canada
Statistics Canada

SCHEDULE II

(Paragraph 3(1)(*b*))

Air Canada
Air Canada

Anti-Dumping Tribunal
Tribunal antidumping

Atlantic Pilotage Authority
Administration de pilotage de l'Atlantique

Atomic Energy of Canada Limited
Énergie atomique du Canada, Limitée

Bank of Canada
Banque du Canada

Canada Council
Conseil des Arts du Canada

Canada Deposit Insurance Corporation
Société d'assurance-dépôt du Canada

Canada Lands Company Limited
Société immobilière du Canada Limitée

Canada Mortgage and Housing Corporation
Société canadienne d'hypothèques et de logement

Canada Post Corporation
Société canadienne des postes

Canadian Arsenals Limited
Les Arsenaux canadiens, Limitée

Canadian Broadcasting Corporation
Société Radio-Canada

Canadian Centre for Occupational Health and Safety
Centre canadien d'hygiène et de sécurité au travail

Canadian Commercial Corporation
Corporation commerciale canadienne

ANNEXE II

(Alinéa 3 (1)*b*))

Administration de la voie maritime du Saint-Laurent
St. Lawrence Seaway Authority

Administration de pilotage de l'Atlantique
Atlantic Pilotage Authority

Administration de pilotage des Laurentides
Laurentian Pilotage Authority

Administration de pilotage du Pacifique
Pacific Pilotage Authority

Agence d'examen de l'investissement étranger
Foreign Investment Review Agency

Agence de surveillance du secteur pétrolier
Petroleum Monitoring Agency

Air Canada
Air Canada

Les Arsenaux canadiens, Limitée
Canadian Arsenals Limited

Banque du Canada
Bank of Canada

Banque fédérale développement
Federal Business Development Bank

Bibliothèque du Parlement
Library of Parliament

Bureau du commissaire des pénitenciers
Office of Commissioner of Penitentiaries

Bureau de l'enquêteur correctionnel
Office of the Correctional Investigator

Bureau du juge-arbitre
Office of the Umpire

- Canadian Cultural Property Export Review Board
  - *Commission canadienne d'examen des exportations de biens culturels*
- Canadian Film Development Corporation
  - *Société de développement de l'industrie cinématographique canadienne*
- Canadian International Grain Institute
  - *L'institut international du Canada pour le grain*
- Canadian Judicial Council
  - *Conseil canadien de la magistrature*
- Canadian National Railways, as defined in the *Canadian National Railways Act*
  - *Chemins de fer nationaux du Canada, au sens de la Loi sur les Chemins de fer nationaux du Canada*
- Canadian Patents and Development Limited
  - *Société canadienne des brevets et d'exploitation Ltée*
- Canadian Saltfish Corporation
  - *Office canadien du poisson salé*
- Canadian Wheat Board
  - *Commission canadienne du blé*
- Cape Breton Development Corporation
  - *Société de développement du Cap-Breton*
- Commission on Pacific Fisheries Policy
  - *Commission sur la politique des pêches du Pacifique*
- Crown Assets Disposal Corporation
  - *Corporation de disposition des biens de la Couronne*
- Defence Construction (1951) Limited
  - *Construction de défense (1951) Limitée*
- Eldorado Nuclear Limited
  - *Eldorado Nucléaire Limitée*
- Export Development Corporation
  - *Société pour l'expansion des exportations*
- Farm Credit Corporation
  - *Société de crédit agricole*
- Federal Business Development Bank
  - *Banque fédérale de développement*
- Foreign Claims Commission
  - *Commission des réclamations étrangères*
- Foreign Investment Review Agency
  - *Agence d'examen de l'investissement étranger*
- Fraser River Harbour Commission
  - *Commission du port du fleuve Fraser*
- Freshwater Fish Marketing Corporation
  - *Office de commercialisation du poisson d'eau douce*
- Government House (Staff paid by the Governor General from his salary or allowance)
  - *Résidence de son Excellence le Gouverneur général (Personnel rémunéré sur le traitement ou les allocations du gouverneur général)*
- Hamilton Harbour Commissioners
  - *Commissaires du port de Hamilton*
- Harbourfront Corporation
  - *Harbourfront Corporation*
- Heritage Canada Foundation
  - *La Société Héritage Canada*
- International Development Research Centre
  - *Centre de recherches pour le développement international*
- Lakehead Harbour Commission
  - *Commission du port de Lakehead*
- Laurentian Pilotage Authority
  - *Administration de pilotage des Laurentides*
- Library of Parliament
  - *Bibliothèque du Parlement*
- Loto Canada Inc.
  - *Loto Canada Inc.*
- Bureau du séquestre (biens ennemis)
  - *Office of the Custodian of Enemy Property*
- Centre canadien d'hygiène et de sécurité au travail
  - *Canadian Centre for Occupational Health and Safety*
- Centre de recherches pour le développement international
  - *International Development Research Centre*
- Centre parlementaire pour les affaires étrangères et le commerce extérieur
  - *Parliamentary Centre for Foreign Affairs and Foreign Trade*
- Chemins de fer nationaux du Canada, au sens de la Loi sur les Chemins de fer nationaux du Canada
  - *Canadian National Railways, as defined in the Canadian National Railways Act*
- Commissaires du port de Hamilton
  - *Hamilton Harbour Commissioners*
- Commissaires du port de Toronto
  - *Toronto Harbour Commissioners*
- Commission canadienne du blé
  - *Canadian Wheat Board*
- Commission canadienne d'examen des exportations de biens culturels
  - *Canadian Cultural Property Export Review Board*
- Commission des champs de bataille nationaux
  - *The National Battlefields Commission*
- Commission des réclamations étrangères
  - *Foreign Claims Commission*
- Commission du port du fleuve Fraser
  - *Fraser River Harbour Commission*
- Commission du port de Lakehead
  - *Lakehead Harbour Commission*
- Commission du port de Nanaimo
  - *Nanaimo Harbour Commission*
- Commission du port de North Fraser
  - *North Fraser Harbour Commission*
- Commission du port d'Oshawa
  - *Oshawa Harbour Commission*
- Commission du port de Port Alberni
  - *Port Alberni Harbour Commission*
- Commission du port de Windsor
  - *Windsor Harbour Commission*
- Commission du système métrique
  - *Metric Commission*
- Commission du textile et du vêtement
  - *Textile and Clothing Board*
- Commission royale d'enquête sur l'«Ocean Ranger»
  - *Royal Commission on the "Ocean Ranger"*
- Commission sur la politique des pêches du Pacifique
  - *Commission on Pacific Fisheries Policy*
- Conseil canadien de la Magistrature
  - *Canadian Judicial Council*
- Conseil des Arts du Canada
  - *Canada Council*
- Conseil des ports nationaux
  - *National Harbours Board*
- Conseil national de commercialisation des produits de ferme
  - *National Farm Products Marketing Council*
- Conseil national de l'esthétique industrielle
  - *National Design Council*
- Construction de défense (1951) Limitée
  - *Defence Construction (1951) Limited*
- Corporation commerciale canadienne
  - *Canadian Commercial Corporation*

Metric Commission
Commission du système métrique

Nanaimo Harbour Commission
Commission du port de Nanaimo

National Arts Centre Corporation
Corporation du Centre national des Arts

The National Battlefields Commission
Commission des champs de bataille nationaux

National Design Council
Conseil national de l'esthétique industrielle

National Farm Products Marketing Council
Conseil national de commercialisation des produits de ferme

National Harbours Board
Conseil des ports nationaux

North Fraser Harbour Commission
Commission du port de North Fraser

Northern Transportation Company Limited
Société des transports du nord Ltée

Office of Commissioner of Penitentiaries
Bureau du commissaire des pénitenciers

Office of the Correctional Investigator
Bureau de l'enquêteur correctionnel

Office of the Custodian of Enemy Property
Bureau du séquestre (biens ennemis)

Office of the Umpire
Bureau du juge-arbitre

Oshawa Harbour Commission
Commission du port d'Oshawa

Pacific Pilotage Authority
Administration de pilotage du Pacifique

Parliamentary Centre for Foreign Affairs and Foreign Trade
Centre parlementaire pour les affaires étrangères et le commerce extérieur

Petro-Canada
Petro-Canada

Petroleum Compensation Board
Office des indemnisations pétrolières

Petroleum Monitoring Agency
Agence de surveillance du secteur pétrolier

Port Alberni Harbour Commission
Commission du port de Port Alberni

Royal Canadian Mint
Monnaie royale canadienne

Royal Commission on the "Ocean Ranger"
Commission royale d'enquête sur l'«Ocean Ranger»

St. Lawrence Seaway Authority
Administration de la voie maritime du Saint-Laurent

Standards Council of Canada
Conseil canadien des normes

Teleglobe Canada
Téléglobe Canada

Textile and Clothing Board
Commission du textile et du vêtement

Toronto Harbour Commissioners
Commissaires du port de Toronto

Uranium Canada Limited
Uranium Canada Limitée

VIA Rail Canada Inc.
VIA Rail Canada Inc.

Windsor Harbour Commission
Commission du port de Windsor

Corporation de disposition des biens de la Couronne
Crown Assets Disposal Corporation

Corporation du Centre national des Arts
National Arts Centre Corporation

Eldorado Nucléaire Limitée
Eldorado Nuclear Limited

Énergie atomique du Canada, Limitée
Atomic Energy of Canada Limited

Harbourfront Corporation
Harbourfront Corporation

L'Institut international du Canada pour le grain
Canadian International Grain Institute

Loto Canada Inc.
Loto Canada Inc.

Monnaie royale canadienne
Royal Canadian Mint

Office canadien du poisson salé
Canadian Saltfish Corporation

Office de commercialisation du poisson d'eau douce
Freshwater Fish Marketing Corporation

Office des indemnisations pétrolières
Petroleum Compensation Board

Petro-Canada
Petro-Canada

Résidence de son Excellence le Gouverneur général (Personnel rémunéré sur le traitement ou les allocations du gouverneur général)
Government House (Staff paid by the Governor General from his salary or allowance)

Société d'assurance dépôt du Canada
Canada Deposit Insurance Corporation

Société canadienne des brevets et d'exploitation Ltée
Canadian Patents and Development Limited

Société canadienne d'hypothèques et de logement
Canada Mortgage and Housing Corporation

Société canadienne des postes
Canada Post Corporation

Société du crédit agricole
Farm Credit Corporation

Société de développement du Cap-Breton
Cape Breton Development Corporation

Société de développement de l'industrie cinématographique canadienne
Canadian Film Development Corporation

Société pour l'expansion des exportations
Export Development Corporation

La Société Héritage Canada
Heritage Canada Foundation

Société immobilière du Canada Limitée
Canada Lands Company Limited

Société Radio-Canada
Canadian Broadcasting Corporation

Société des transports du nord Ltée
Northern Transportation Company Limited

Téléglobe Canada
Teleglobe Canada

Tribunal antidumping
Anti-Dumping Tribunal

Tribunal central d'appel
Central Appeal Tribunal

Uranium Canada Limitée
Uranium Canada Limited

VIA Rail Canada, Inc.
VIA Rail Canada, Inc.

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Employees of the federal Government of Canada represent the most highly organized sector of the economy. Close to one hundred per cent of the federal government employees eligible to bargain collectively are members of employee organizations and are covered by collective agreements. Yet these people are the newest actors on the collective bargaining scene.

Collective bargaining rights, on the private sector model, have long been taken for granted in Canada, for employees of municipal governments and for workers in a wide range of other public services, including many federal and provincial government agencies and boards. Despite this fact, the federal government and all but one of the provinces were still resisting the extension of similar rights to their employees less than two decades ago.

The enactment of the Public Service Staff Relations Act in 1967 has been characterized as a 'bold experiment'. This Act replaced a unilateral system for the determination of most terms and conditions of employment for federal public servants with a bilateral system whereby employees were assured of a large measure of participation in the determination of those terms and conditions.

This study examines the Act in detail, considers how the parties have accommodated themselves to it, and discusses the problems they have encountered in adapting to some of its provisions. In conclusion, the authors present their recommendations for amendments to the law and for changes in some of the practices by the parties within the framework of the law.

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